

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Appeals for
the Federal Circuit and the United
States Court of International Trade

Vol. 26

SEPTEMBER 9, 1992

No. 37

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The decisions, rulings, notices, and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 10-1992)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of July 1992 follow. The last notice was published in the CUSTOMS BULLETIN on July 29, 1992.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, Room 2104, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 566-6956.

Dated: August 21, 1992.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

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COP9200237	19920702	20120702	MONSTER IN MY POCKET
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COP9200248	19920730	20120730	MIXED SUPER HAULER
COP9200249	19920730	20120730	SUPER MILITARY HAULERS
COP9200250	19920730	20120730	SOFT BUNNY KID DOLL
COP9200251	19920730	20120730	TWIN NINJA RIDER
COP9200252	19920730	20120730	SUNNY SHY DOLL
COP9200253	19920730	20120730	AERO FIGHTERS
COP9200254	19920730	20120730	JH COLLECTIBLES
COP9200255	19920730	20120730	FLOWER PEN
COP9200256	19920730	20120730	HEE HEE CONBOY
COP9200257	19920730	20120730	LAUGHING SANTA
COP9200258	19920730	20120730	MAMMY 5 PIECE KITCHEN T
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CUSTOMS SERVICE
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DETAIL

OR MSK	OWNER NAME	RES
ICAL NINJA	CAPCOM, CO., LTD.	N
	TAITO CORPORATION	N
	KOHAMI INC.	N
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	KOHAMI INC.	N
	KOHAMI INC.	N
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00 (PRPQ) VERSION 1.01	LANE COMPANY INC.	N
MODEL 800 BASIC INPUT/OUTPUT	INTERNATIONAL BUSINESS MACHINES	N
SYSTEM BASIC INPUT/OUTPUT	INTERNATIONAL BUSINESS MACHINES	N
2	INTERNATIONAL BUSINESS MACHINES	N
VERSION 4.00 TECHNICAL REFERENCE	INTERNATIONAL BUSINESS MACHINES	N
	GREAT IMPORTATION, INC.	N
ASSORTMENT	P.H. WOO & SONS D/B/A ABC TOYS	N
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	MC O'RIVER, INC.	N
	JW COLLECTIBLES, INC.	N
	YOSHINAGA CORPORATION	N
	P.H. WOO & SONS, INC.	N
TOOL SET HOLDER, #74259	T.L. PRODUCTS' PROMOTING CO., LTD	N
58	ARTMARK-CHICAGO, LTD.	N
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PUFFALUMP MOUSE	FISHER-PRICE, INC.	N
PUFFALUMP PUPPY	FISHER-PRICE, INC.	N
PUFFALUMP BEAR	FISHER-PRICE, INC.	N
60001	BOLEY CORPORATION	N
OR FOOTBAGS	LERNER STORES, INC.	Y
	KRANSCO	N
	NINTENDO OF AMERICA, INC.	N
	LANCETTI CREAZIONI S.R.L.	N
	GULFSTREAM AEROSPACE CORP.	N
	ACME BOOT COMPANY, INC.	Y
	SC AMERICA, INC.	N
	SUPERBA, INC.	N
	MOTOWN RECORD COMPANY, L.P.	N

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CUSTOMS BULLETIN AND DECISIONS, VOL. 26, NO. 37, SEPTEMBER 9, 1992

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TMK9200382	19920729	20090314	CLEAR & TUFF STYLIZED
TMK9200383	19920729	20060311	MEGA-TUFF
TMK9200384	19920729	20081108	ASHTON-YORK
TMK9200385	19920729	20100703	ASHLEY FURNITURE INDUSTRIES AN
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TMK9200387	19920730	20100612	ASHLEY

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ASHLEY FURNITURE INDUSTRIES, INC	N
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ASHLEY FURNITURE INDUSTRIES, INC	N
PEAVEY ELECTRONICS CORP.	N
ASHLEY FURNITURE INDUSTRIES, INC	N

U.S. CUSTOMS SERVICE

APPLICATION FOR RECORDATION OF TRADE NAME:
"MODULAR COMPUTER SYSTEMS, INC."

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "MODULAR COMPUTER SYSTEMS," used by Modular Computer Systems, Inc., a/k/a Modcomp, a Florida corporation located at 1650 West McNab Road, P.O. Box 6099, Fort Lauderdale, Florida 33340.

The application states that the trade name is used in connection with computers, computer peripherals, computer programs and computer systems. The merchandise is manufactured in the United States.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before October 26, 1992.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Room 2104), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Robert L. Knapp, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202) 566-6956.

Dated: August 21, 1992.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, August 26, 1992 (57 FR 38712)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 175

RECEIPT OF DOMESTIC INTERESTED PARTY PETITION CONCERNING CLASSIFICATION OF LOAD ROLLER PRODUCTS FOR FORK LIFT TRUCKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: Customs has received a petition submitted on behalf of a domestic interested party concerning the classification of certain load roller products for fork lift trucks. Customs has held that the products were classified as parts of fork lift trucks subject to a free rate of duty. The petitioner contends that the products should be classified as ball bearings subject to a rate of duty of 11 per cent, *ad valorem*. This document invites comments concerning the correctness of the determination that the products are classified as parts of fork lift trucks.

DATE: Comments must be received on or before September 29, 1992.

ADDRESS: Comment (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2119, Washington, D.C. 20229 (202-566-8237).

FOR FURTHER INFORMATION CONTACT: Christopher M. Schmitt, Metals and Machinery Classification Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), a petition has been filed by a domestic interested party concerning the classification of certain load roller products for fork lift trucks in subheading 8431.20.00, HTSUS, subject to a Column 1 free rate of duty.

In HQ 087775 (January 17, 1991), Customs held that certain load roller products for fork lift trucks were classified as parts of fork lift trucks in subheading 8431.20.00, HTSUS, subject to a Column 1 free rate of duty. HQ 088888 (March 24, 1992), affirmed HQ 087775. The products were described in HQ 088888 as steel tires into which assemblies containing rolling elements are incorporated. The tires are designed to turn in the channels of fork lift mast uprights. The products

are manufactured in two configurations. The first configuration is comprised of a separate, reinforced tire into which inner and outer rings containing rolling elements are installed. The steel tire of the second configuration is manufactured integrally with the outer ring section it incorporates.

In HQ 088888, Customs noted that the products are referred to be many names including "load rollers", "wheels", "bearings", "guide wheels", "mast guide bearings" and "rollers". Customs found that the products are similar in form and function to certain lifting and handling equipment components which are not described as ball bearings. Customs also noted that the products may incorporate bearing components, but as a whole the products are not mere ball bearings.

The petitioner contends that the products are classified as ball bearings in subheading 8482.10.50, HTSUS, subject to a Column 1 rate of duty of 11 per cent, *ad valorem*. The petitioner's arguments include that the products are ball bearings of special configuration described by Heading 8482, that Customs placed undue emphasis on the outer tire component of the products, and that the products are excluded from Heading 8431 by HTSUS Chapter XVI Note 2.

COMMENTS

Pursuant to section 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments from interested parties on this issue. The petition of the domestic interested party, as well as all comments received in response to this notice, will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Ave., NW., Washington, D.C. 20229.

AUTHORITY

This notice is published in accordance with Section 175.21(a), Customs Regulations (19 CFR 175.21(a)).

DRAFTING INFORMATION

The principal author of this document was Christopher M. Schmitt, Metals and Machinery Classification Branch, U.S. Customs Service. Personnel from other Customs offices participated in its development.

MICHAEL H. LANE,

Acting Commissioner of Customs.

Approved; August 13, 1992.

PETER K. NUNEZ,

Assistant Secretary of the Treasury.

[Published in the Federal Register, August 28, 1992 (57 FR 39158)]

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

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Dominick L. DiCarlo

Judges

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Jane A. Restani
Thomas J. Aquilino, Jr.

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R. Kenton Musgrave
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Decisions of the United States Court of International Trade

(Slip Op. 92-131)

CONSOLIDATED INTERNATIONAL AUTOMOTIVE, INC., PLAINTIFF V.
UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANT

Court No. 91-09-00700

[Application for attorney's fees and other expenses denied.]

(Dated August 14, 1992)

Hume & Associates (Robert T. Hume), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Vanessa P. Sciarra*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Robert E. Nielsen*), for defendant.

OPINION

RESTANI, *Judge*: This matter concerns plaintiff's application for attorney's fees and other expenses pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1988).¹ Plaintiff, Consolidated International Automotive, Inc., ("Consolidated") charges that the position of defendant, the Department of Commerce ("Commerce") in *Chrome-Plated Lug Nuts from the People's Republic of China*, 56 Fed. Reg. 46,153 (Dep't Comm. 1991) (final det.) ("Final Det.") was not "substantially justified" within the meaning of the EAJA, 28 U.S.C. § 2412 (d)(1)(B) (1988). Consolidated claims that as the "prevailing party" in this case, it is entitled to recover \$38,350.00 in attorney's fees and \$3,099.50 for other expenses, in accordance with Section 2412(d)(1)(A) of the EAJA and Rule 68 of the Rules of the United States Court of International Trade.

FACTS

On November 1, 1990, Consolidated filed an antidumping petition with Commerce and the International Trade Commission concerning chrome-plated lug nuts ("lug nuts") from the People's Republic of China ("PRC"). On April 18, 1991, Commerce issued its preliminary determination in which it found less than fair value sales of lug nuts from the

¹ The EAJA applies to actions in this court. *Atochem v. United States*, 9 CIT 207, 210, 609 F. Supp. 319, 322 (1985).

PRC. *Chrome-Plated Lug Nuts from the People's Republic of China*, 56 Fed. Reg. 15,857 (Dep't Comm. 1991). Commerce found that the PRC was a nonmarket economy ("NME") country and that foreign market value ("FMV") should be determined on the basis of the factors of production in a comparable market economy. Utilizing data from Pakistan, Commerce calculated a constructed FMV and ultimately set the dumping margin at 66.49%.

In the final determination, however, Commerce adopted a new methodology for calculating FMV. The analysis was drawn from the preliminary determination in another investigation, *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 25,664 (Dep't Comm. 1991) (prelim. det.). It provided for use of home market prices in valuing the factors of production if "inputs purchased in a NME are purchased at market-oriented prices." *Final Det.*, 56 Fed. Reg. at 46,154 (quoting *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. at 25,667). Applying this methodology, Commerce determined that "the presumption of state control ha[d] been overcome for the steel [and chemicals] purchased for use in the production of chrome-plated lug nuts." *Final Det.*, 56 Fed. Reg. at 46,155. Consequently, Commerce used PRC prices for steel and chemical inputs and the margin dropped from 66.49% to 4.24%.

In response, Consolidated initiated a civil action challenging the final determination. Consolidated alleged that Commerce's methodology was contrary to law and that its failure to provide adequate notice of the changed methodology violated Consolidated's due process rights. Consolidated also filed a draft countervailing duty ("CVD") petition on November 11, 1991, alleging that if Commerce used steel and chemical input prices from state-owned companies as market prices, the CVD law should apply. On December 12, 1991, Consolidated filed the CVD petition, and on January 9, 1992, Commerce initiated an investigation based on the petition. *Chrome-Plated Lug Nuts and Wheel Locks from the PRC*, 57 Fed. Reg. 877 (Dep't Comm. 1992).

In the meantime, on November 13, 1991, Commerce had initiated a CVD investigation of fans from the PRC. *Oscillating Fans and Ceiling Fans from the PRC*, 56 Fed. Reg. 57,616 (Dep't Comm. 1991). In the initiation notice, Commerce stated that, in recent antidumping determinations involving the PRC, it had adopted a methodology to determine the market orientation of a sector by "analyzing the prices and costs incurred by each producer within that sector." *Id.* at 57,617. Commerce noted, however, that it was reconsidering the appropriateness of its methodology.

On January 24, 1992, the government filed a motion to remand the civil action so that Commerce could reconsider the final determination. On February 4, 1992, Consolidated filed for injunctive relief alleging irreparable harm from Commerce's incorrect deposit rate of 4.24%. On February 21, 1992, the court granted Commerce's motion for remand and denied Consolidated's request for injunctive relief.

On March 20, 1992, Commerce filed the remand determination with the court. In the remand determination, Commerce described the new criteria for determining FMV in cases involving NME countries. Commerce admitted that its prior scope of inquiry had been too narrow and that the "absence of explicit government involvement in these transactions is not sufficient to warrant the conclusion that the prices for these inputs are market-driven." *Remand Determination* at 3 (Dep't Comm. Mar. 20, 1992). Under the new guidelines, Commerce found that the prices paid for PRC lug nut inputs were not market-determined. *Id.* at 5. Hence, Commerce recalculated FMV using surrogate country prices for the steel and chemical inputs. *Id.* at 8. Thereupon, Commerce increased the dumping margin from 4.24% to 42.42%.

On April 8, 1992, the court dismissed the civil action without prejudice and instructed Commerce to proceed with publication of its new determination. On April 24, 1992, Commerce published an amended final determination and order, with a cash deposit rate of 42.42%. *Chrome-Plated Lug Nuts from the PRC*, 57 Fed. Reg. 15,052 (Dep't Comm. 1992) (amendment to final det.).

Consolidated then filed this application for fees and expenses, arguing that it prevailed in its position that the initial final determination was clearly erroneous and without substantial justification.

DISCUSSION

Under the EAJA, a court must award attorney's fees and expenses to a prevailing party unless the position of the United States was substantially justified or special circumstances make the award unjust. See 28 U.S.C. § 2412(d)(1)(A) (1988).²

I. Consolidated is a Prevailing Party:

The first issue is whether Consolidated is a "prevailing party" within the meaning of the EAJA.

Consolidated filed the civil action to challenge Commerce's methodology for determining FMV in the final determination. As noted in the April 8, 1992 judgment, Consolidated later sought dismissal because Commerce admitted that it had not considered relevant data, and, on remand, increased the dumping margin approximately tenfold. In large part, Consolidated received the relief it sought through the civil action. While Commerce did not reinstate the 66.49% deposit rate, it did raise the rate significantly to 42.42%.

According to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a plaintiff may be considered a "prevailing party" if she succeeds on any significant issue in the litigation which achieves some of the benefit she sought in

² 28 U.S.C. § 2412 (d)(1)(A) provides, in part:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded * * *, incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1988).

bringing suit. *Id.* at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). Moreover, the legislative history makes clear that the term "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U.S.C.C.A.N. 4953, 4984, 4990. Indeed, a party may be deemed "prevailing" if she obtains a favorable settlement of her case, if the plaintiff has sought a voluntary dismissal of a groundless complaint, or even if she does not ultimately prevail on all issues. *Id.*; see also *Naekel v. Department of Transp., Fed. Aviation Admin.*, 884 F.2d 1378 (Fed. Cir. 1989) (discharged air traffic controller who prevailed on four out of six issues on appeal was "prevailing party"). Thus, to determine whether a party has "prevailed," a court should look to the substance of the litigation, and not merely to the technical disposition of the case or motion. *Devine v. Sutermeister*, 733 F.2d 892, 898 (Fed. Cir. 1984).

Clearly then, a party need not have litigated to final judgment and been awarded the ultimate relief requested in order to be entitled to an award of fees under the EAJA. In this light, the revised margin of 42.42% sufficiently approaches the preliminary rate of 66.49% to establish Consolidated as a "prevailing party." In addition, Commerce's new methodology more closely resembles its preliminary analysis, which favored Consolidated, than its original final determination. The existence of a dismissal here does not preclude recovery. Indeed, courts have held that a "prevailing party" may exist in cases involving dismissals. See *Green v. Bowen*, 877 F.2d 204 (2d Cir. 1989) (claimant awarded benefits following dismissal was "prevailing party"); see also *Devine v. Sutermeister*, 773 F.2d 892 (Fed. Cir. 1984) (union awarded attorney's fees as prevailing party though consent decree entered).

In addition, courts have recognized that a plaintiff may be a "prevailing party" within the meaning of EAJA even when the lawsuit is rendered moot. See *Atochem v. United States* 9 CIT 207, 609 F. Supp 319, (1985) (plaintiff may be "prevailing party" when requested relief granted and suit rendered moot); *Gotches v. Heckler*, 773 F.2d 108 (7th Cir. 1985) (widow whose benefits were cancelled was "prevailing party" where benefits increased significantly after lawsuit was filed), *amended*, 782 F.2d 765 (1985). Thus, even though Consolidated's suit was rendered moot when Commerce amended its final determination, Consolidated is still a "prevailing party."

In short, although the court did not reach the merits of Consolidated's case, case law demonstrates that Consolidated is a "prevailing party" nonetheless.

II. Commerce was Substantially Justified in its Action:

The second issue is whether Commerce was substantially justified in its action.

The EAJA permits an award of fees and other expenses to a prevailing party only if the position taken by the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(A). In *Pierce v. Underwood*, 487

U.S. 552 (1988), the Supreme Court set forth the standard by which to judge the government's position in EAJA disputes:

[“substantially justified” does not mean] “justified to a high degree,” but rather “justified in substance or in the main”—that is, *justified to a degree that could satisfy a reasonable person*. That is no different from the “reasonable basis both in law and fact” formulation. * * *

487 U.S. at 565 (emphasis added).

The fact that Consolidated “prevailed” under the EAJA does not mean that it automatically receives an award of fees and expenses. As the Court of Appeals for the Federal Circuit elaborated:

“[T]he EAJA was not intended to be an automatic fee-shifting device in cases where the petitioner prevails. * * * [S]ubstantial justification is to be decided case-by-case on the basis of the record.” * * * “The mere fact that the United States lost the case does not show that its position in defending the case was not substantially justified.”

Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States, 837 F.2d 465, 467 (Fed. Cir.), cert. denied, 488 U.S. 819 (1988) (citations omitted); see also *Gava v. United States*, 699 F.2d 1367 (Fed. Cir. 1983) (fact that government lost its case in Court of Claims did not mean that litigating position was not substantially justified).

In fact, fees and other expenses are generally awarded only where the government offers “no plausible defense, explanation, or substantiation for its action.” *Griffin & Dickson v. United States*, 21 Cl. Ct. 1, 6–7 (1990); see e.g. *Beta Systems, Inc. v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989) (fees awarded when government provided “no defense or explanation” for its position); *McDonald v. Schweiker*, 726 F.2d 311, 316 (7th Cir. 1983) (government need only show that it had solid basis in law and fact for its position, even if incorrect).

Because Commerce has presented an acceptable basis both in law and fact for its actions, Consolidated is not entitled to an award of fees. While Commerce was conducting separate antidumping investigations of lug nuts and fans from the PRC, it was concurrently reevaluating its method for assessing the PRC economy. The source of the problem was that some sectors of the PRC economy were moving towards a market-oriented model. As Commerce attempted to apply a test that would account for such “bubbles of capitalism,” it may have made some errors, but none that reveal its actions as unjustified.

When determining FMV, Commerce must make several findings. If Commerce determines that a given country has a NME, it must then decide whether the available data permits it to find FMV under provisions pertaining to market economy countries. 19 U.S.C. § 1677b(c)(1) (1988). Hence, a finding that a country is a NME country does not automatically trigger the NME country analysis for calculating FMV. Rather, Commerce must also find that the available information is insufficient to permit use of the market economy analysis. Commerce

wrestled with these provisions and attempted to formulate an analysis by which it could distinguish between market and nonmarket sectors within a NME.

Commerce thought it had developed such an approach in its preliminary determination of PRC fans. 56 Fed. Reg. 25,664. Under the "fans" methodology, if Commerce determined that inputs purchased in a NME were purchased at market-driven prices, such prices could be used to determine FMV. Applying this approach in the PRC lug nuts final determination, Commerce focused on individual transaction prices. It found that "the presumption of state control" had been overcome, and used PRC prices for steel and chemicals. 56 Fed. Reg. at 46,155. This formulation resulted in a deposit rate of 4.24%.

Later, however, Commerce decided that its concentration upon individual transaction prices was too narrow and that it needed a broader perspective. It decided to examine the economic conditions in each industry that supplied raw materials for production of lug nuts. Accordingly, Commerce requested a remand to reconsider its final determination in PRC lug nuts. During the remand period, Commerce developed a new approach which led to a broader analysis of the economic factors affecting the lug nut industry. For example, Commerce examined the extent of the state's purchases of steel, as well as state ownership of steel producers. With this method of analysis, Commerce seemed to be better able to determine whether steel costs and prices were market-driven. The amended final determination led to a deposit rate of 42.42%. Although this was a substantial increase from the rate in the original final determination, it does not make Commerce's original approach unjustified, given the factual circumstances.

Courts have held that government agencies may be substantially justified in their actions, even if erroneous, if they are dealing with previously unaddressed issues. See *Luciano*, 837 F.2d at 467 (though antidumping order revoked, Commerce's determination was substantially justified because of "complexity, uniqueness, and newness" of issues); *Devine*, 733 F.2d at 898 (government position substantially justified because issue "one of first impression"). Hence, as the matters confronting Commerce concerning the PRC economy and its lug nut industry were not settled or fixed,³ and Commerce was making good faith attempts to address them, its actions were substantially justified. Accordingly, plaintiff's application for fees is denied.

³ Indeed, in a letter date-stamped September 16, 1991, the Assistant Secretary for Import Administration of Commerce wrote to the President of Consolidated as follows:

Nonmarket economy cases pose extremely complex policy issues which are growing more complicated in light of the rapidly changing political and economic landscapes in those countries. Our decision in your case does contain some firsts.

Memorandum in Support of Plaintiff's Application for Temporary Restraining Order and Order to Show Cause for Preliminary Injunction, Exhibit 1.

(Slip Op. 92-132)

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED MACHINE AND FURNITURE WORKERS, INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AND UNITED STEELWORKERS OF AMERICA, PLAINTIFFS v. UNITED STATES, DEFENDANT, AND ORION ELECTRIC CO., LTD., GOLDSTAR CO., LTD., GOLDSTAR OF AMERICA, INC., GOLDSTAR ELECTRONICS INTERNATIONAL, INC., GOLDSTAR MEXICO, S.A. DE C.V., SAMSUNG ELECTRON DEVICES CO., LTD., SAMSUNG MEXICANA, S.A., SAMSUNG ELECTRONICS AMERICA, INC., SONY CORP., SONY CORP. OF AMERICA, MITSUBISHI ELECTRIC CORP., MITSUBISHI ELECTRONICS AMERICA, INC., MITSUBISHI ELECTRONICS INDUSTRIES CANADA INC., LTD., MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., HITACHI, LTD., AND SANYO MANUFACTURING CORP., INTERVENOR-DEFENDANTS

Court No. 91-04-00249

OPINION

[Plaintiffs' motion for judgment on the agency record denied; action dismissed.]

(Decided August 14, 1992)

Collier, Shannon, Rill & Scott (Paul D. Cullen, Laurence J. Lasoff and Stephen A. Jones) for the plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Vanessa P. Sciarra*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Robert J. Heilferty*), of counsel, for the defendant.

Reid & Priest (David A. Gantz and Elizabeth H. Lefebvre) for intervenor-defendant Orion Electric Co., Ltd.

Donovan Leisure, Rogovin, Hugel & Schiller (Michael P. House and R. Will Planert) for intervenor-defendants Goldstar Co., Ltd., Goldstar of America, Inc., Goldstar Electronics International, Inc. and Goldstar Mexico, S.A. de C.V.

Akin, Gump, Hauer & Feld, L.L.P. (Sukhan Kim, Warren E. Connelly and Robert W. Aulsebrook) for intervenor-defendants Samsung Electron Devices, Co., Ltd., Samsung Mexicana, S.A. and Samsung Electronics America, Inc.

Wilmer, Cutler & Pickering (Leonard M. Shambon and Rebecca Arbogast) for intervenor-defendants Sony Corporation and Sony Corporation of America.

Baker & McKenzie (Thomas P. Ondeck and Kevin O'Brien) for intervenor-defendants Mitsubishi Electric Corporation, Mitsubishi Electronics America, Inc. and Mitsubishi Electronics Industries Canada Inc.

Willkie Farr & Gallagher (William H. Barringer, James P. Durling and Daniel L. Porter) for intervenor-defendant Matsushita Electric Industrial Co. Ltd.

McDermott, Will & Emery (Carl W. Schwarz and David J. Levine) for intervenor-defendant Hitachi, Ltd.

Sharretts, Paley, Carter & Blauvelt, P.C. (Gail T. Cumins and Ned H. Marshak) for intervenor-defendant Sanyo Manufacturing Corporation.

AQUILINO, Judge: In this action the plaintiffs have interposed a motion for judgment on the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Color Picture Tubes from Canada, Japan, Republic of Korea & Singapore; Negative Final Determinations of Circumvention of Antidumping Duty Orders*, 56 Fed.Reg. 9,667 (March 7, 1991). They characterize the action

as "the first * * * that attempts to address the problem of diversion of a major component part covered by an antidumping order."

Jurisdiction of the court is pursuant to 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c).

I

Four such antidumping-duty orders were promulgated by the ITA on January 7, 1988, covering color television picture tubes ("CPTs") from Canada, Japan, the Republic of Korea and Singapore. See 53 Fed. Reg. 429 to 432. The orders define the merchandise as

cathode ray tubes suitable for use in the manufacture of color television receiver[s] or other color entertainment display devices intended for television viewing.

In addition, those governing such tubes imported from Canada, Japan and Singapore provide:

CPTs which are imported as incomplete television assemblies that contain a CPT as well as additional components are also included within the scope of this order unless both of the following criteria are met: (1) The CPT is "physically integrated" with other television receiver components in such a manner as to constitute one inseparable amalgam; and, (2) the CPT does not constitute a significant portion of the cost or value of the items being imported.¹

The order for such merchandise from Korea contains similar language as well as the following provision:

CPTs imported as part of color television receiver kits or as part of incomplete television receiver assemblies that are subsequently assembled into a completed color television (CTV) by a related party are included within the scope of the existing order on complete and incomplete color television receivers from Korea ("CTV order") (40 FR 18336, April 30, 1984). Therefore, these CPTs are not included within the scope of this order.

These orders issued to counteract circumvention of existing antidumping-duty orders governing complete foreign color televisions. Thereafter the record indicates that the CPTs began to enter the United States via Mexico, following integration in that country into such receivers. The petitioning trade unions, plaintiffs herein, thereupon requested that the ITA investigate per the anticircumvention provisions of the Omnibus Trade and Competitiveness Act of 1988, § 781(b), 19 U.S.C. § 1677j(b). The agency granted the request and published notice of *Initiation of Anti-Circumvention Inquiry on Antidumping Duty Orders on Color Picture Tubes From Canada A-122-605, et al.*, 55 Fed. Reg. 34,950

¹ For the ITA considerations underlying these two criteria, see, for example, *Final Determination of Sales at Less Than Fair Value; Color Picture Tubes From Canada*, 52 Fed. Reg. 44,161, 44,162 (Nov. 18, 1987). The order in regard to Japan adds that

CPTs which are imported together with other parts as incomplete television assemblies whether shipped directly from Japan or through Mexico should be included in the scope of this order. * * *

* * * CPTs which are shipped directly from Japan and imported together with other parts as television receiver kits (which contain all parts necessary for assembly into complete television receivers) are excluded from the scope of this order. However, CPTs which are shipped through Mexico and imported together with other parts as television receiver kits should be included in the scope of this order.

(Aug. 27, 1990). According to the published preliminary results of this inquiry, the ITA sought information from some 21 companies. Based on the record developed and the 1988 act, the agency reached negative preliminary and final determinations as follows:

After consideration of the criteria of section 781(b) * * *, we preliminarily determine that no circumvention of the antidumping duty orders on CPTs is occurring. We base this determination on our conclusions that CTVs imported from Mexico into the United States are not of the same class or kind as the CPTs incorporated in those CTVs and that the difference between the value of CTVs containing CPTs originating in the order countries and the value of the CPTs is not small.

Color Picture Tubes From Canada, Japan, the Republic of Korea, and Singapore; Negative Preliminary Determinations of Circumvention of Antidumping Duty Orders, 55 Fed.Reg. 52,066, 52,069 (Dec. 19, 1990). Subsequently:

After a full examination of the comments received, we determine that no circumvention of the antidumping duty orders is occurring. These negative determinations of circumvention are in accordance with 19 U.S.C. 1677j and 19 CFR 353.29.

56 Fed.Reg. at 9,672.

The comments referred to included a plea by the petitioners that the ITA apply the "full value" of the class or kind of merchandise defined in the antidumping-duty orders, namely, "incomplete television assemblies that contain a CPT", and find the difference between that value and a complete color television to be "small" within the meaning of the 1988 act. *See id.* at 9,668 (*Comment 1*). The agency responded that the statute

directs the Department to determine the difference between the value of the merchandise imported into the third country and the value of merchandise completed or assembled in that country * * *. A circumvention determination is based on the fact pattern that exists at the time of the inquiries. Therefore, in each inquiry and for each respondent, we calculated the difference in value based upon the actual value of the picture tube imported into Mexico and the actual value of the CTV imported into the United States during the period of inquiry.

* * * [T]he full value of a CPT can only be the value of the picture tube itself. The references to any additional parts in the CPT orders are for definitional purposes only. These references are there to help determine whether the CPT component of the merchandise should fall within a CPT or CTV order. We have concluded that the value of the CPT should be based upon the value of the picture tube itself since only the value of the picture tube component, not any additional parts, is subject to an antidumping duty when entering the commerce of the United States.

Id. In response to comments by the petitioners to the effect that the CTVs imported from Mexico are of the same class or kind of merchandise as that covered by the CPT orders, the ITA added that it had

clarified the scope of the orders on CTVs and CPTs * * * to address instances of circumvention while avoiding overlap of such orders. We have gone to great lengths to ensure the integrity of the orders on CPTs and CTVs by capturing those imported articles which would fall between the cracks of narrowly-defined CPT and CTV orders. However, the clarification of these orders does not mean that we have collapsed two separate antidumping duty orders with different applicable rates into one. The two-pronged test set forth in the CPT orders was designed to distinguish CPTs from CTVs. The Department's direct language was crafted to determine which merchandise would be subject to the two-pronged test. In the Canada, Japan, and Singapore orders, it was clearly stated that the test is applicable to "incomplete color television assemblies" * * * to determine whether such assemblies should be included in either the CTV or CPT order. Complete CTVs, however, were not intended to be subject to such a test since we previously determined that "a completed CTV is not within the same class or kind of merchandise being investigated [CPTs]" (Color Picture Tubes from Korea, 52 FR 44186, November 18, 1987). This reasoning applies to the other three CPT orders as well. In short, completed color television receivers are not the imported articles envisioned by the CPT orders.

Id. at 9,669.

II

Clearly, there is support for the conclusion that completed color television receivers are not the imported articles envisioned by the CPT orders. Moreover, while the annals on dumping of CTVs are extensive², an antidumping-duty order covering that phenomenon via Mexico does not appear among them.

Although forced to concede the nonexistence of such an order³, the plaintiffs still come now, continuing to claim "diversion" and "evasion" and praying for court intervention on their behalf. While such appellations⁴ may be apposite in light of the background of this action, judicial relief is permissible only upon a showing that the ITA's final negative

² See, e.g., *Antidumping—Television receiving sets, monochrome and color, from Japan*, T.D. 71-76, 5 Cust. B. & Dec. 151 (1971), and the dozens of subsequent reported administrative and court decisions related thereto.

³ See, e.g., Plaintiffs' Reply, pp. 3-4, 17; Transcript of oral argument on July 30, 1992 ("Tr."), p. 15.

⁴ From the onset of these proceedings, the petitioner-plaintiffs have sought to characterize their focus as "diversion" (or "evasion") in contrast to "circumvention", the choice of term for the heading to section 1677. Their petition [Record Document 26], for example, is entitled "Request to Investigate the Diversion of U.S. Imports of Color Picture Tubes through Mexico". They attempt to distinguish the two terms as follows:

* * * "[C]ircumvention["] * * * involves the avoidance of duties on a covered article by shipping *uncovered* parts and components for assembly into a covered article prior to sale to the ultimate consumer.

* * * "[D]iversion" involves the attempt to avoid the imposition of antidumping or countervailing duties on a covered article by shipping the *covered* article itself to a third country where it undergoes further processing or assembly before reexport to the United States. Thus, "circumvention" and "diversion" address different problems, with different commercial and legal implications.

Plaintiffs' Memorandum, p. 5 (emphasis in original). See also *id.* at 7; Tr. at 9. Though such transactions, at least as perceived by plaintiffs' able counsel, may be "somewhat different" [Tr. at 9], the court is not convinced that this action hinges on perceptual contradistinction.

determination is not supported by substantial evidence on the record or is not otherwise in accordance with law.

A

As indicated, the agency relied on 19 U.S.C. § 1677j(b), which governs merchandise completed or assembled in other foreign countries by providing that, (1) in general, if (A) it is of the same class or kind as merchandise subject to an antidumping-duty order,

(B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which —

(i) is subject to such order * * *,

(C) the difference between the value of such imported merchandise and the value of the merchandise described in subparagraph (B) is small, and

(D) the administering authority determines that action is appropriate under this paragraph to prevent evasion of such order * * *, the administering authority * * * may include such imported merchandise within the scope of such order * * * at any time such order * * * is in effect.

(2) Factors to consider

In determining whether to include merchandise assembled or completed in a foreign country in a[n] * * * antidumping duty order * * * under paragraph (1), the administering authority shall take into account such factors as —

(A) the pattern of trade,

(B) whether the manufacturer or exporter of the merchandise described in paragraph (1)(B) is related to the person who uses the merchandise described in paragraph (1)(B) to assemble or complete in the foreign country the merchandise that is subsequently imported into the United States, and

(C) whether imports into the foreign country of the merchandise described in paragraph (1)(B) have increased after the issuance of such order * * *.

With regard to these factors, the agency found the following pattern of trade to exist for the period January 1986 through June 1990:

* * * CPT shipments to the United States fell from 2 million units in 1986 to 190,000 units in 1989. At the same time, CPT shipments to Mexico increased from 700,000 units in 1986 to 1.8 million units in 1989. Concurrently, CTV shipments from Mexico to the United States increased from 20,000 units in 1986 to 2 million units in 1989.

Furthermore, in conjunction with the above changes in the CPT pattern of trade, a shift in the pattern of trade for Mexican CTVs has also occurred over the past four years. The percentage of CPTs imported into Mexico and then incorporated into CTVs exported to the United States has increased. Although the exact number of

CPTs from the four countries which are incorporated into Mexican CTVs and sold in the United States cannot be determined from the information provided to the Department, the ratio of Mexican CTV shipments to the United States to imports of CPTs into Mexico from the four countries increased from 3 percent to almost 100 percent during those four years.

55 Fed.Reg. at 52,069. The ITA's inquiry led it to conclude that less than 40 percent of the CPTs purchased from the subject countries were from related CPT producers but also that the above increase of CPT imports into Mexico from those countries amounted to almost 160 percent. *See id.* Nonetheless, its preliminary determination continued:

The Department cannot find circumvention based on these factors alone. Rather, the factors are intended to assist the Department in determining whether to include the merchandise within the scope of an existing antidumping duty order in those situations where the merchandise is of the same class or kind and the difference in value is small.

Id. And the agency abided by this position on final analysis, *supra*.

B

As adopted, the 1988 act does not require the ITA to afford relief of the kind the plaintiffs now seek even if the market factors as well as those set forth in subsection (b)(1) are all supportive. In short, Congress has provided the agency with broad discretion⁵, but not so as to render affirmative determinations where those factors are not all supportive, which is the case here.

Thus, on the record developed this court is unable to conclude that the ITA's approach was not in accordance with the 1988 act. It is clear that the CPT orders, the purpose of which is to counteract circumvention of the CTV orders, were carefully drawn to differentiate CPTs from CTVs⁶ and also that no such CTV order is or has been aimed at Mexico.

Nevertheless, the plaintiffs now argue that the precise CPT definition in the 1988 orders, namely, "cathode ray tubes suitable for use in the manufacture of color television receivers or other color entertainment display devices intended for television viewing" could be held to apply herein in that those tubes do not undergo substantial transformation in Mexico, merely mechanical and electrical integration. Furthermore, they emphasize the language of the order in regard to Korea, *supra*, contending that it specifically includes all CPTs so long as they are not incorporated in CTVs covered by that order. Plaintiffs' Reply, p. 15 n. 5. *See also* Tr. at 7.

⁵ In doing so, Congress also "sought to ensure that any anti-circumvention action taken is consistent with U.S. international obligations." *Brother Industries, Ltd. v. United States*, 15 CIT ___, ___, 769 F.Supp. 374, 378 (1991), quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 602 (1986).

⁶ It should be noted in this regard that, while a legislative report contains a reference to the same "general" class or kind of merchandise, that adjective did not survive codification of 19 U.S.C. § 1677j(b)(1)(A). Compare S.Rep. No. 71, 100th Cong., 1st Sess. 99 (1987) with 19 U.S.C. § 1677j(d) (Later-developed merchandise) and *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F.Supp. 883 (1983).

Whatever the merits of such argumentation, the 1988 act requires that any differences in value be "small" for goods for which antidumping encompassment is sought. In this action, as indicated above, the ITA determined that the differences are

clearly not small. The differences in value for all respondents ranged from 55 to 70 percent (the single non-responding company was given a best information otherwise available (BIA) difference of 55 percent based on petitioners' information). These differences in value percentages indicate that for all respondents, the non-CPT value of the CTV exceeds the value of the picture tube itself. Given the facts of this case, we cannot consider these differences in value to be "small."

56 Fed.Reg. at 9,669.

There is substantial evidence on the record in support of this determination. Courts continue to define this requisite quantum as

more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * * [It] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Iwatsu Electric Co. v. United States, 15 CIT ___, ___, 758 F.Supp. 1506, 1509 (1991), quoting *Matsushita Electric Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed.Cir. 1984), quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), and *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966).

Nonetheless, the plaintiffs press the provision of the 1988 orders that the CPTs "constitute a significant portion of the cost or value of the items being imported" as an alternative ground for relief. According to the record, this condition also appears to be met but not the second criterion of those orders that the CPTs not be physically integrated with other television receiver components in such a manner as to constitute one inseparable amalgam, which apparently properly describes the challenged merchandise from Mexico. In sum, those goods do not satisfy the predicate of the two criteria, namely, "imported as incomplete television assemblies".

C

As an alternative legal theory in the aftermath of the ITA's negative preliminary determination, the plaintiffs have taken the position that, since the CPT orders predate the 1988 act, it cannot undermine them. They attempt to rely on *Mitsubishi Electric Corp. v. United States*, 898 F.2d 1577 (Fed.Cir. 1990), to the effect that its substantive provisions "must yield to the provisions of pre-existing antidumping orders where those statutory provisions would otherwise circumscribe relief established in earlier orders." Plaintiffs' Reply, p. 19.

In that case, the ITA had determined to include within an antidumping-duty order not only cellular mobile telephones from Japan but also

subassemblies thereof⁷, which were defined as "any completed or partially completed circuit modules, the value of which is equal to or greater than five dollars, and which are dedicated exclusively for use in CMT transceivers or control units." *Cellular Mobile Telephones and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value*, 50 Fed.Reg. 45,447, 45,448 (Oct. 31, 1985). On judicial review, the plaintiff-appellant Japanese manufacturers challenged the ITA's decision to include subassemblies, particularly at a five-dollar cutoff. That choice was sustained by both the Court of International Trade, 12 CIT 1025, 700 F.Supp. 538 (1988), and the Court of Appeals. By the time the matter had reached the latter forum, the 1988 act had become law, whereupon the appellants also challenged the selected dollar cutoff on the basis of the "small" difference-in-value standard of 19 U.S.C. § 1677j(b)(1)(C). The court held the new statute had no applicability to the case and shed no

light on the validity of the Administration's decision under an earlier statute to except from an antidumping order only components valued at less than five dollars.

The determination of the applicable scope of an antidumping order that will be effective to remedy the dumping that the Administration has found lies largely in the Administration's discretion. * * * That discretion must be exercised in light of all the facts before the Administration and must reflect that agency's judgment regarding the scope and form of an order that will best effectuate the purpose of the antidumping laws and the violation found. Considering all the circumstances, we cannot say that the Administration abused its discretion or acted contrary to the record in concluding that the antidumping order should cover all subassemblies valued at five dollars or more.

898 F.2d 1582-83 (citation omitted).

In its final determination herein, the ITA took the position that this decision had no bearing⁸. However, during oral argument counsel for the defendant conceded that that position was "a little too strong":

* * * [T]he Commerce Department's position clearly is that the 1988 Act provides them with one avenue for redressing this type of alleged injury. There is nothing in the Act to suggest that any of the inherent powers that Commerce exercised prior to the Act had been taken away from the agency pursuant to that Act.

Tr. at 38. Be that as it may, and whatever the factual similarities then and now, the courts in *Mitsubishi* recognized that grant of relief of the kind the plaintiffs seek has rested, and continues to lie, as a matter of law largely in the ITA's discretion.

⁷ See *Antidumping Duty Order: Cellular Mobile Telephones and Subassemblies From Japan*, 50 Fed.Reg. 51,724 (Dec. 19, 1985).

⁸ See 56 Fed.Reg. at 9,670.

III

On the law and the record before this court, the final determination of the ITA not to make color picture tubes integrated into color televisions in Mexico before importation into the United States subject to the 1988 orders governing dumping of such tubes from Canada, Japan, the Republic of Korea and Singapore must be affirmed, and this action must therefore be dismissed.

Judgment will enter accordingly.

(Slip Op. 92-133)

TOTES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91-06-00423

MEMORANDUM OPINION AND ORDER

Pursuant to USCIT R. 84, plaintiff moves to designate this action as a test case and suspend one action thereunder.

Held: Plaintiff's motions for test case designation and suspension are granted.

(Dated August 14, 1992)

Neville, Peterson & Williams (John M. Peterson), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*John J. Mahon*), for defendant.

DiCARLO, *Chief Judge*: Plaintiff moves, pursuant to USCIT R. 84, to designate this action as a test case and to suspend one other action under it. At issue is whether plaintiff has satisfied the requirements for the test case/suspension procedure. Based on the facts presented, the court grants plaintiff's motions to designate this action as a test case and to suspend *Totes, Inc. v. United States*, Court No. 92-02-00105, under the test case.

BACKGROUND

Plaintiff challenges the classification of a product known as the Totes "Trunk Organizer" imported from China. The Customs Service classified the merchandise as a travel bag under HTSUS Subheading 4202.92.3030, thereby subjecting it to textile quota category 670-L restraints. Plaintiff claims the merchandise is more appropriately classifiable as a motor vehicle accessory under HTSUS Subheading 8708.99.5080, and thus not subject to textile quota restraints. Plaintiff maintains that its "Trunk Organizer" is not excluded from classification under Chapter 87 by virtue of Note 2 to Section XVII of the HTSUS; that the merchandise is suitable for use solely or principally with vehi-

cles described in Chapter 87; and that HTSUS Headings 8701 to 8705 "most specifically provide for" the merchandise.

After issue was joined, plaintiff filed its motions for test case designation and suspension. Plaintiff alleges that the proposed test case and the action for which suspension is sought involve a common issue, namely "the proper tariff classification of the Totes 'Trunk Organizer.'" Plaintiff further alleges that this "threshold legal question * * * is potentially dispositive" of the action for which suspension is sought. Finally, since it expects to import the merchandise on a continuing basis and file new actions raising the same classification issue, plaintiff maintains that the designation of a test case and suspension of identical actions thereunder will "achieve economies of time, effort and expense, and will result in the uniform disposition" of that issue. Thus, plaintiff claims that it has satisfied the requirements of USCIT R. 84, and that these actions "are appropriate for disposition * * * [under] the 'test case/suspension' procedure."

Plaintiff's counsel states that it, as required by Rules 84(d) and 7(b), has consulted with counsel for defendant. As a result, defendant's counsel indicated that it would evaluate plaintiff's motions and subsequently advise the court of defendant's position.

In its response, defendant agrees that the two actions "involve similar merchandise and issues," and thus, "test case designation and suspension * * * would be appropriate." Defendant suggests that consolidation may be an alternative method to disposing of these actions. However, because plaintiff expects to be importing the merchandise on a continuing basis, defendant maintains that the test case/suspension procedure is "more likely [to] effectuate the just, speedy and inexpensive determination of these actions." For these reasons, defendant consents to plaintiff's motions for test case designation and suspension.

DISCUSSION

Initially, the court is to determine which of two alternatives, consolidation or the test case/suspension procedure, is best suited, under the circumstances, for disposing of actions with a common issue of fact or question of law. See *Generra Sportswear, Inc. v. United States*, 16 CIT at ___, Slip Op. 92-62 (Apr. 28, 1992); *PEG Bandage, Inc. v. United States*, 16 CIT ___, Slip Op. 92-63 (May 5, 1992). In particular, the court will inquire as to which procedure best serves to "'achieve economies of time, effort and expense' and 'promote uniformity of decisions,'" *Generra*, 16 CIT at ___, Slip Op. at 4, and whether the test case/suspension procedure or consolidation will "best avoid unnecessary costs or delays," *PEG Bandage*, 16 CIT at ___, Slip Op. at 4." *A. T. Clayton & Co. v. United States*, 16 CIT ___, ___, Slip Op. 92-88, at 5 (June 11, 1992).

Consolidation is preferable when it results in conservation of time and expense for the court and the parties. Conversely, when consolidation may result in "an unwieldy and chaotic proceeding," the test case/suspension procedure is the preferred mechanism. *Id.* Among other considerations for the court are the number of protests and entries in-

volved, the number of ports of entry, and the degree to which discovery, trial preparation and judicial resources will be strained by the alternative procedures. *Id.*

Notwithstanding defendant's consent to plaintiff's requests for relief, the court has an independent responsibility to "exercise its judicial discretion" in considering plaintiff's motions. *Generra*, 16 CIT at ___, Slip Op. at 6. See also *Semperit Indus. Prods., Inc. v. United States*, 16 CIT ___, Slip Op. 92-134 (Aug. 14, 1992) (court denied consent motion to suspend without prejudice because requisite showings were not made that the test case/suspension procedure, rather than consolidation, was a more orderly mechanism for disposing of the actions proposed for suspension).

In *PEG Bandage*, the court was presented with a test case and two previously suspended actions, all with the same plaintiff and identical merchandise, involving five protests, 31 entries and one port of entry. After considering the benefits of both consolidation and the test case/suspension procedure, the court, *sua sponte*, ordered consolidation. Here, the court has before it two actions, with the same plaintiff and identical merchandise, involving three protests, five entries and one port of entry. However, unlike *PEG Bandage*, plaintiff has alleged that it intends to continuously import the merchandise in question. In view of this allegation, defendant has consented to plaintiff's requests for relief stating that the test case/suspension procedure, rather than consolidation, would provide for the "just, speedy, and inexpensive determination" of actions involving the proper tariff classification of the Totes "Trunk Organizer." Consolidation, under these circumstances, has the potential for creating a chaotic and unwieldy proceeding. Therefore, the court concludes that the test case/suspension procedure will result in judicial economy, and avoid unnecessary costs or delays for the parties and the court. *Cf. Junior Gallery, Ltd. v. United States*, 16 CIT ___, Slip Op. 92-130 (Aug. 13, 1992) (consolidation more efficient method of disposing of actions having a discreet factual issue in common; test case/suspension procedure would not aid in conclusive determination of those actions).

Having determined that the test case/suspension procedure will best serve the administration of justice, the court will consider whether the motions do, in fact, satisfy the criteria for test case designation and suspension. See *Generra*, 16 CIT ___, Slip Op. 92-62 (Apr. 28, 1992); *A. T. Clayton*, 16 CIT ___, Slip Op. 92-88 (June 11, 1992); *Semperit*, 16 CIT ___, Slip Op. 92-134 (Aug. 14, 1992).

The authority for the test case/suspension practice is found in USCIT R. 84. Pursuant to Rule 84(b), an action may become a test case "by order of the court upon a motion for test case designation made after issue

is joined." The criteria for suspension are set forth in Rule 84(c), which provides:

An action may be suspended under a test case if the action involves an issue of fact or a question of law which is to be the same as an issue of fact or question of law involved in the test case.

The party moving for suspension also must provide the court with, *inter alia*, "a concise statement of the issue of fact or question of law alleged to be the same in both actions." USCIT R. 84(d).

To have an action designated as a test case, the moving party must demonstrate that it has "other pending actions, the disposition of which will be facilitated if they are suspended pending the decision in the test case." *Generra*, 16 CIT at ___, Slip Op. at 4. In particular, the movant is to show that the test case and the actions in which suspension is sought have "a significant and identified issue of fact or question of law in common;" that there exists a common threshold issue that is potentially dispositive of the actions; and that other common circumstances show "that a decision in the test case will facilitate the disposition of the other actions." *Id.*

Plaintiff's motions, quite properly, are not predicated on "mere allegations of sameness." *Id.* at ___, Slip Op. at 5. *But see, e.g., Semperit*, 16 CIT at ___, Slip Op. at 6 (court denied motion to suspend without prejudice because plaintiff filed *pro forma* motion). Rather, plaintiff has made the requisite showings for the designation of a test case and the suspension of an action thereunder. *Generra*, 16 CIT at ___, Slip Op. at 4. Specifically, plaintiff has demonstrated, and defendant agrees, that the proposed test case and the pending action sought to be suspended have the same significant and identified question of law, namely the proper classification of the Totes "Trunk Organizer." The parties have shown that the classification of the imported merchandise is the common threshold issue, which is potentially dispositive of both of these actions. Moreover, plaintiff and defendant have demonstrated that a decision in the test case (and thus, the test case/suspension procedure) will facilitate the ultimate disposition of the action proposed for suspension and other actions that may be commenced by plaintiff raising the same classification issue.

It is evident to the court that counsel for plaintiff is familiar with the requirements for the designation of a test case and the suspension of an action pursuant to Rule 84 and the applicable case law. Plaintiff has not merely parroted the provisions of Rule 84, and has done more than simply file bare-bones motions. As an aid to the court, defendant has offered more than a *pro forma* response. It has provided the court with the benefit of its fully developed views on plaintiff's motions. Together, counsel for the parties have provided the information necessary for the court to determine the appropriateness of the test case/suspension procedure in these cases and to discharge its responsibility to manage its docket "to provide for the efficient and expeditious termination" of cases. *Men's Wear Int'l, Inc. v. United States*, 13 CIT 817 (1989).

The court finds that the parties have demonstrated that this action is appropriate for test case designation and that circumstances warrant the suspension of *Totes, Inc. v. United States*, Court No. 92-02-00105, under the test case.

Accordingly, it is hereby

ORDERED that plaintiff's motions are granted, and it is further

ORDERED that Court No. 91-06-00423 is designated a test case, and it is further

ORDERED that Court No. 92-02-00105 is suspended under Court No. 91-06-00423.

(Slip Op. 92-134)

SEMPERIT INDUSTRIAL PRODUCTS, INC., PLAINTIFF *v.*
UNITED STATES, DEFENDANT

Court No. 92-07-00443

MEMORANDUM OPINION AND ORDER

Pursuant to USCIT R. 84, plaintiff moves to suspend this action under a test case, *Semperit Indus. Prods., Inc. v. United States*, Court No. 90-10-00566

Held: Plaintiff's motion to suspend is denied without prejudice.

(Dated August 14, 1992)

Coudert Brothers (Robert L. Eisen and Michelle S. Bratsafolis), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice, for defendant.

DiCARLO, *Chief Judge:* Plaintiff moves, pursuant to USCIT R. 84, to suspend this action under a test case, *Semperit Indus. Prods., Inc. v. United States*, Court No. 90-10-00566. At issue is whether plaintiff has satisfied the criteria for suspension. In view of the circumstances presented, the court denies plaintiff's motion to suspend without prejudice.

BACKGROUND

Plaintiff challenges the classification of certain industrial conveyor belting of vulcanized rubber imported from Austria. The Customs Service classified the merchandise as conveyor belting of vulcanized rubber combined with textile materials in which man-made fibers predominate by weight under HTSUS Subheading 4010.91.15. Plaintiff claims the merchandise is classifiable as conveyor belting composed in chief weight of vulcanized rubber and containing a single, man-made textile material under HTSUS Subheading 4010.91.19.

Plaintiff alleges that "[b]oth the captioned civil action and *Semperit Industrial Products, Inc. v. United States*, * * * [Court No.

90-10-00566] involve the [same] legal issue," namely, the proper tariff classification of the imported industrial conveyor belting. Thus, plaintiff argues that "[b]ased on the existence of a common question of law in the test case and the captioned court action, the criteria for suspension set forth in Rule 84, are satisfied." Defendant has indicated its agreement to the suspension of this action by stamping "No Objection" on plaintiff's motion.

DISCUSSION

Suspension of an action under a test case is governed by USCIT R. 84. The criteria for suspension are set forth in Rule 84(c), which provides:

An action may be suspended under a test case if the action involves an issue of fact or question of law which is to be the same as an issue of fact or question of law involved in the test case.

The party seeking suspension also is to provide the court with, *inter alia*, "a concise statement of the issue of fact or question of law alleged to be the same in both actions" and to comply with the provisions of Rule 7. USCIT R. 84(d). Rule 7(b) requires the moving party to consult with the opposing party "to attempt to reach agreement, in good faith, on the issues involved in the motion."

Even though the parties have agreed to the suspension of this action, the court has an "independent responsibility to exercise its judicial discretion" in considering plaintiff's motion. *Generra Sportswear, Inc. v. United States*, 16 CIT ___, ___, Slip Op. 92-62, at 6 (Apr. 28, 1992).

The court has two alternative methods—consolidation and the test case/suspension procedure—for disposing of actions, commenced under 28 U.S.C. § 1581 (a), involving a common issue of fact or question of law. In considering the alternatives, the court is to determine whether consolidation or the test case/suspension procedure will best "achieve economies of time, effort and expense" and "promote uniformity of decisions," *Generra*, 16 CIT at ___, Slip Op. at 4, and will "best avoid unnecessary costs or delays," *PEG Bandage, Inc. v. United States*, 16 CIT ___, ___, Slip Op. 92-63, at 4 (May 5, 1992).

Consolidation is the preferred method when the result is the conservation of time and expense for the court and the parties. Conversely, the test case/suspension procedure is preferable when consolidation will produce "an unwieldy and chaotic proceeding." *A. T. Clayton & Co. v. United States*, 16 CIT ___, ___, Slip Op. 92-88, at 5 (June 11, 1992). In determining which alternative is most appropriate under the circumstances, the court also will consider other factors, including the number of protests and entries involved, the number of ports of entry and the degree to which discovery, trial preparation and judicial resources will be strained by consolidation or the test case/suspension procedure. *Id.* Compare *Generra* and *A. T. Clayton* (actions, protests, entries and ports so numerous that consolidation would not best serve the administration of justice) with *PEG Bandage* (consolidation ordered because of limited number of actions, protests, entries and ports would not be unduly bur-

densome on court parties). See also *Totes, Inc. v. United States*, 16 CIT ___, Slip Op. 92-133 (Aug. 14, 1992) (because of continuous stream of imports, potential created for unwieldy and chaotic proceeding; test case/suspension procedure rather consolidation would result in judicial economy, and avoid unnecessary costs or delay); *Junior Gallery, Ltd. v. United States*, 16 CIT ___, Slip Op. 92-130 (Aug. 13, 1992) (consolidation more efficient method of disposing of actions having a discreet factual issue in common; test case/suspension procedure would not aid in conclusive determination of those actions).

Unlike plaintiffs in *Generra, A.T. Clayton and Totes*, this plaintiff makes no showing that the test case/suspension procedure rather than consolidation is a more orderly mechanism for disposing of this action and the test case. Plaintiff has not demonstrated that suspension will best serve the administration of justice by conserving the resources of time, effort and expense on the part of the parties and the court. Plaintiff also has not shown that consolidation would complicate discovery, unduly burden the parties in preparing for trial or strain the court's resources. Thus, while plaintiff's motion procedurally complies with the requirements of Rule 84, the court lacks sufficient information to act upon the motion.

Assuming *arguendo* that suspension instead of consolidation is the appropriate mechanism for disposing of this action, the court must determine whether plaintiff's motion does, in fact, satisfy the criteria for suspension. *Totes*, 16 CIT at ___, Slip Op. at 6 (citations omitted). Plaintiff offers little to substantiate its motion to suspend other than an allegation that the test case and this action have a common question of law, namely the proper tariff classification of the imported industrial conveyor belting. Plaintiff also has not shown that a decision in the test case will facilitate the disposition of this action. *Generra*, 16 CIT at ___, Slip Op. at 4.

It is clear that "mere allegations of sameness" or a statement that the test case and the action to be suspended are related will not suffice. *Id.* at ___, Slip Op. at 5. Moreover, "merely because a case involves * * * the same provision * * * as a test case does not mean that another case involving the same provisions is *ipso facto* suspensible thereunder." *Air-Sea Forwarders, Inc. v. United States*, 69 Cust. Ct. 327, 329, C.R.D. 72-24 (1972). Additionally, a motion that simply recites the requirements of Rule 84(c) and (d) does not automatically entitle plaintiff to suspension of its action under a test case.

The court expects that experienced practitioners, such as those representing plaintiff, are familiar with the requirements of Rule 84 and the applicable case law. However, it is evident that plaintiff's counsel have done nothing more than simply file a *pro forma* motion to suspend. While the court has an independent responsibility to determine if plaintiff is entitled to suspension, responsibility for researching the facts and the presentation of legal argument in support of the motion under Rule 84 lies with plaintiff. A plaintiff who files a bare-bones motion shirks

that responsibility and imposes an inappropriate burden on the court. For the court to exercise its independent responsibility, plaintiff must make an adequate demonstration that suspension is warranted. Since the court is presented with a motion that does not comply with the requirements of Rule 84, it is forced to speculate as to plaintiff's rationale for the motion. *Cf. Totes*. For the court to rely solely upon the conclusory allegations of plaintiff and not insist on the requisite showings, it would abdicate the exercise of its judicial discretion in deciding the merits of the motion to suspend.

In parroting Rule 84, plaintiff's counsel assert that the motion to suspend is being made pursuant to Rule 7. Rule 7 provides that "[b]efore a motion * * * is made, the moving party shall consult with [the] opposing * * * [party] to attempt to reach agreement, in good faith, on the issues involved in the motion." USCIT R. 7(b). Under that rule, the movant has an obligation to state in its motion whether the parties have consulted, and whether they have or have not reached agreement on the issues. When consultation occurs, the court expects the moving party to state whether the opposing party agrees with the positions taken by the movant. The court will accept the moving party's representations as true unless the opposing party files a response. If the parties consult and fail to reach agreement, then it would be helpful for the court to receive the fully developed views of the opposing party. In either event, the court should have the benefit of the results of the consultation between the parties.

Here, there is no indication that plaintiff consulted with defendant and whether the parties did or did not reach agreement on the motion to suspend. All the court has is an indication that defendant does not object to the suspension of this action. Because plaintiff's motion lacks the requisite showings, the court cannot determine the appropriateness of suspending this action under the *Semperit* test case, Court No. 90-10-00566. Accordingly, plaintiff's motion to suspend is denied without prejudice. Plaintiff may renew its motion within 30 days of the date of entry of this order.

(Slip Op. 92-135)

D&M WATCH CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-12-01775 etc.

MEMORANDUM OPINION AND ORDER

[Defendant's motions to alter or amend orders awarding attorneys' fees and duty refunds to plaintiffs and for other relief granted in part and denied in part.]

(Dated August 18, 1992)

Irving A. Mandel (Steven R. Sosnov and Jeffrey H. Pfeffer) for the plaintiffs.
 Stuart M. Gerson, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge,
 International Trade Field Office, Commercial Litigation Branch, U.S. Department of Jus-

tice (*James A. Curley*); Office of Assistant Chief Counsel, U.S. Customs Service (*Edward N. Maurer*), of counsel, for the defendant.

AQUILINO, Judge: Final judgment entered in the above-numbered case on May 7, 1990 and in 104 other, similar cases between April 1990 and December 1991 on behalf of various named plaintiff importers, including D & M Watch Corp., docketed in this Court of International Trade as 83-01-00040-S, 83-04-00548, 83-05-00723, 83-07-00957, 83-07-00986, 83-07-00988-S, 83-07-01058, 83-08-01243, 83-08-01246, 83-09-01287-S, 83-09-01289, 84-01-00008, 84-01-00128, 84-03-00424, 84-03-00428, 84-04-00473, 84-06-00848, 84-07-00957, 84-07-00972, 84-07-00982, 84-07-00986, 84-07-00988, 84-08-01117, 84-09-01323, 84-11-01567, 84-11-01568, 84-12-01794, 85-01-00058, 85-02-00162, 85-02-00165, 85-02-00227, 85-03-00368, 85-03-00443, 85-04-00501, 85-04-00573, 85-05-00729, 85-07-00996, 85-08-01012, 85-08-01013, 85-08-01071, 85-08-01073, 85-08-01117, 85-08-01118, 85-08-01119, 85-09-01156, 85-10-01523, 85-10-01527, 86-04-00440, 86-04-00441, 86-05-00595, 86-05-00596, 86-06-00768, 86-06-00771, 86-06-00793, 86-07-00846, 86-07-00847, 86-07-00849, 86-07-00945, 86-09-01128, 86-09-01209, 86-11-01399, 86-11-01489, 86-12-01505, 86-12-01506, 86-12-01532, 86-12-01593, 87-01-00030, 87-01-00052, 87-01-00078, 87-01-00090, 87-01-00108, 87-02-00180, 87-03-00482, 87-03-00515, 87-03-00516, 87-03-00521, 87-03-00538, 87-03-00539, 87-08-00862, 87-08-00863, 87-08-00864, 87-08-00865, 87-08-00871, 87-09-00920, 87-09-00922, 87-09-00967, 87-09-00968, 87-09-00972, 87-10-01002, 87-10-01003, 87-10-01015, 87-10-01042, 87-11-01072, 87-12-01151, 87-12-01153, 88-02-00115, 88-02-00146, 88-04-00267, 88-04-00306, 88-04-00313, 88-05-00371, 88-07-00529, 88-07-00531 and 88-07-00532. Each of the judgments had been submitted to the court upon an agreed statement of facts and provided for reliquidation of certain entries listed therein.

After the Customs Service had refused or failed to reliquidate all such entries, the plaintiffs interposed a motion for citation of contempt of court and other relief against the defendant. A hearing in conformity with CIT Rule 63 was held, and the court thereafter granted in part that motion per Slip Op. 92-58, 16 CIT ____ (April 24, 1992), familiarity with which is presumed. Among other points, the court concluded that the defendant was indeed in contempt, whereupon the Chief of the New York Customs Region's Residual Liquidation and Protest Branch and the defendant and its other officers, employees, agents, servants, sureties and assigns were ordered to reliquidate within 30 days

each and every entry listed on the final judgments entered in the 105 actions enumerated above and not previously reliquidated or annotated by the parties as "not stipulable" and which would result in lower duties, with any resulting duty differentials to be paid to the plaintiffs, together with interest thereon as provided by law

and then to serve and file a written report of compliance. *Id.* at 28-29. On May 26, 1992, the defendant filed such a report, followed by a supple-

ment on June 5th. In addition to describing steps taken, the defendant requested further instructions regarding six entries allegedly involving "exceptional circumstances".

I

A hearing was held on defendant's report(s) on June 16, 1992, at which time the plaintiffs abandoned any claim regarding two of the remaining entries in question. As for the other four, the parties agreed to make refunds on a pro-rata basis, and they submitted a proposed order providing, in part, that the defendant

calculate the average duty refund given on other entries from among the 612 entries reliquidated pursuant to Slip Op. 92-58 for the individual importer and apply that derived percentage to the liquigated duties on the individual lost entry.

In addition to hearing on June 16th from the defendant regarding its efforts to purge itself of contempt, the court afforded the plaintiffs an opportunity to be heard on their motion for award of costs and attorneys' fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

Based on the record developed, the court issued Slip Op. 92-97, 16 CIT (June 26, 1992), and six orders *sub nom.* *D & M Watch Corp. v. United States*, CIT Nos. 83-12-01775 and 84-04-00473, *Dynamic Supply Co. v. United States*, CIT No. 84-07-00986, *Americana Creations v. United States*, CIT No. 84-08-01117, *Time Electronics Corp. v. United States*, CIT No. 84-11-01567, and *Liberty International Trading v. United States*, CIT No. 87-10-01015. Again, familiarity is presumed. Among other things, the order filed in lead case 83-12-01775 granted the motion for costs and fees

to the extent that the plaintiffs in the above-numbered cases recover against the defendant \$453.30 in costs and \$59,550 as reasonable fees on behalf of their attorneys.

The orders in cases 84-04-00473, 84-07-00986, 84-08-01117 and 84-11-01567 directed the defendant to reliquidate the four entries referred to above

by first calculating the average duty refund for other entries from among the 410 entries reliquidated pursuant to Slip Op. 92-58 on behalf of the above-named plaintiff importer[,] * * * applying that derived percentage to the liquigated duties on the [given] entry

and then transmitting the refund so derived, plus interest, to the respective plaintiff.

Since entry of those orders, the defendant has interposed three motions for relief related thereto. The first, styled as Motion to Alter or Amend Judgment Orders Entered on June 26, 1992, takes issue with the above-quoted, mandated mode of calculating the average duty refunds upon a representation that the "parties agreed that the average would be based on 612 entries rather than 410 entries, as provided in the or-

der[s].” However, in compliance with those orders, and before their time to respond to this motion had run, the plaintiffs reported receipt of four refund checks — on July 9 and 10, 1992. Their report stated further that they did “not know the basis defendant used to calculate the pro-rata refunds and, therefore, do not offer any opinion on the propriety thereof.”

This report precipitated Defendant’s Motion to Stay Enforcement of Judgment Orders Entered on June 26, 1992 or, in the Alternative, for an Extension of Time. Attached to this second motion is a copy of a letter to the court dated July 17, 1992 and explaining:

The basis on which the refunds were calculated was the average duty refund for the importer from among 612 entries, as described in paragraphs 5 and 6 of Mr. Ryan’s declaration of May 26, 1992. The process of reliquidating the entries in the cases noted above, and in preparing refund checks, began shortly after the hearing on June 16, 1992, so that the checks would issue by July 7, 1992. The plaintiffs submitted a proposed order, which the defendant consented to, on June 19, 1992. Final preparations for issuing the refund checks were completed by the Customs Service on June 19, 1992. The Court entered an order [*sic*] on June 26, 1992, directing the defendant to calculate the refund based on an average duty refund of 410 entries, rather than 612. The defendant then moved the Court on June 30, 1992, to alter or amend the order to change the “410” entries to “612,” as agreed to by the parties. The plaintiffs opposed the motion on July 15, 1992.

The Customs Service’s calculation of the duty refunds in the cases noted above thus was based on the expectation that the Court would enter the order submitted by the parties on June 19, 1992. Since the defendant’s motion is *sub judice*, the defendant will seek a stay or an extension of time in which to comply if that becomes necessary.

Thirdly, the defendant has served and filed a motion to alter or amend the lead Slip Op. 92-97 order

to provide that the award of costs and attorneys fees be paid by the defendant directly to each of the 22 plaintiffs in these cases in equal amounts, or in such other amounts as the Court may direct.

A hearing was held on these three motions on August 13, 1992.

II

To address the last motion first, as indicated above, the total award of costs and attorneys’ fees is found in one order, filed in the name of the lead plaintiff, D & M Watch Corp., CIT No. 83-12-01775. The court opted for this approach in the interest of administrative ease. Nevertheless, the defendant now contends that the order

does not state how the award of attorneys fees should be apportioned among the 22 plaintiffs in these cases, nor to whom it should be paid.

It is not possible for the Customs Service to make one check payable to 22 plaintiffs. Consequently, 22 separate checks must be prepared.

Plaintiffs' counsel candidly admits that he "reacted angrily" to this motion, characterizing it as

clearly a malicious attempt to set plaintiff against plaintiff, and to interfere with the attorney-client relationships. [Defendant's counsel] was told that Customs, based on written consents of the involved plaintiffs, had sent the refund checks in these matters, made payable to each plaintiff, to the plaintiff in care of their counsel on each and every entry. [Defendant's counsel] was told that no reason in law or logic existed why attorneys fees as damages should not be so handled, save solely for a malicious purpose.¹

Apparently, this response was preceded by a letter from him to defendant's counsel to the effect that he "fully appreciate[s] that attorney's fees awarded as damages are the funds of the client as opposed to being the property of counsel"² and offering to "sort out the appropriate rights and responsibilities of our clients with our clients."³ Stated in other words in plaintiffs' subsequent formal response: "We can keep our own house in order."⁴

At the hearing, the court heard nothing to the contrary, nor is it aware of anything in the record of these proceedings which could enable it to conclude otherwise.

To the extent that Slip Op. 92-97 left the defendant with a genuine sense of uncertainty as to satisfaction of the award of costs and attorneys' fees or subsequent internecine behavior on the other side, perhaps this decision, reaffirming the court's original intent that the Customs Service draw one check in the total amount of \$60,003.30, payable to the order of D & M Watch Corp. *et alia*, c/o Irving A. Mandel, 40 Exchange Place, New York, New York 10005, will allay any such fears. Although to be drawn in the name of the lead plaintiff *et alia*, the court hereby affirms that the total amount of the check is the entitlement of all of the named parties plaintiff in accordance with the governing facts and law, as effectuated by their attorneys of record, who are officers of this Court of International Trade.

Indeed, the plaintiffs produced at the hearing on August 13th copies of the four duty-refund checks at issue in defendant's other two motions, each drawn to the order of the particular plaintiff importer, care of Mr. Mandel at his office address.

In regard to those motions, at the request of the court, the defendant has now submitted the data relied on by Customs in calculating the four refunds. The data show Americana Creations, for example, to be the

¹ Plaintiff's [sic] Opposition to Defendant's Motion to Alter or Amend Judgment Order of June 26, 1992, p. 1.

² Defendant's Motion to Alter or Amend Judgment Order Entered on June 26, 1992, Exhibit A, first page (July 24, 1992).

³ *Id.* at 2.

⁴ Plaintiff's Opposition, p. 5.

party plaintiff in CIT Nos. 83-07-01058, 84-01-00008 and 84-12-01794, as well as in case 84-08-01117, together encompassing some 34 numbered entries. The data further reveal duty refunds on 17 of those entries, with 16 indicating zero refund.⁵ The Service calculated the refund percentage to be 48.90 on those entries by dividing the total refund amount by the total duties paid on the 33 entries for which documentation exists. That percentage was multiplied by \$3,408, the duties paid on entry 4701-81-533972-0, to arrive at \$1,666.51 as the refund, plus interest thereon as provided by law.

Defendant's instant motion in support of this approach takes the position that it is

not known whether the missing entries would actually have been reliquidated with refunds. It is logical however to determine the pro-rata share based upon the pool of entries which comprise both types of entries, including the 202 entries that were reliquidated without change * * *, and not just the 410 that resulted * * * in refunds. That was the basis on which the Customs Service calculated the refunds * * *.⁶

Of course, the logic the court opted for in its June 26th orders was that the actual refunds could and would best determine the average thereof. That is, the parties' agreement, as reflected in their proposed form of order, neither represented the most compelling logic nor conclusive language. Nonetheless, the plaintiffs did agree, and they now offer only perfunctory opposition to the defendant, confirming receipt of their checks and contending thereby that the motion to alter or amend appears moot.

Certainly, defendant's unilateral action, which was not in conformity with the court's remedial orders, is still subject to judicial sanction. Agreements between parties which are made part of their lawsuits are always subject to judicial scrutiny. Here, suffice it to state that such, additional scrutiny at this time does not lead this court to conclude that the interests of justice have not been served by the approach taken by Customs. Ergo, it is hereby affirmed *nunc pro tunc*.

III

Now, therefore, in the light of the foregoing discussion, it is

ORDERED that Defendant's Motion to Alter or Amend Judgment Orders Entered on June 26, 1992 (June 30, 1992) be, and it hereby is, granted to the extent that those orders entered in *D & M Watch Corp. v. United States*, CIT No. 84-04-00473, *Dynamic Supply Co. v. United States*, CIT No. 84-07-00986, *Americana Creations v. United States*, CIT No. 84-08-01117, and *Time Electronics Corp. v. United States*, CIT No. 84-11-01567, are deemed amended to provide for first calculation of the average duty refund from among the 612 entries reliquidated pursuant to Slip Op. 92-58; and it is further

⁵ According to the parties, the papers for the remaining entry are "missing".

⁶ Defendant's Motion to Alter or Amend Judgment Orders Entered on June 26, 1992, p. 2 (June 30, 1992).

ORDERED that Defendant's Motion to Stay Enforcement of Judgment Orders Entered on June 26, 1992 or, in the Alternative, for an Extension of Time be, and it hereby is denied as moot; and it is further

ORDERED that Defendant's Motion to Alter or Amend Judgment Order Entered on June 26, 1992 (July 24, 1992) be, and it hereby is, denied; and it is further hereby

ORDERED that the defendant issue forthwith a check in the total amount of \$60,003.30, payable to the order of D & M Watch Corp. *et al.*, c/o Irving A. Mandel, 40 Exchange Place, New York, New York 10005 and file a written report of compliance herewith with the court; and it is further hereby

ORDERED that, upon receipt of the check as aforesaid, the plaintiffs file with the court and serve upon the defendant written acknowledgment thereof.

(Slip Op. 92-136)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MFG. CORP., AND NTN TOYO BEARING CO., LTD., PLAINTIFFS *v.* UNITED STATES AND BARBARA H. FRANKLIN, SECRETARY, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 89-06-00350

Pursuant to Rule 56.1 of the Rules of this Court, plaintiffs move for judgment on the agency record as to Count 2 of their complaint, claiming that the Department of Commerce, International Trade Administration ("Commerce"), failed to determine the scope of its investigation of antifriction bearings, other than tapered roller bearings, and parts from Japan. Furthermore, plaintiffs claim that Commerce should have excluded from its investigation bearing parts not sold in the United States. Defendants counterclaim that plaintiffs' motion was not timely filed and should be dismissed.

Held: Plaintiffs' motion was timely filed with this Court and the motion is denied in all respects on the merits. The petition in this case explicitly states that bearing parts are within the scope of the investigation. Therefore, Commerce's inclusion of bearing parts was reasonable and in accordance with law.

[Plaintiffs' motion denied; case dismissed.]

(Dated August 19, 1992)

Barnes, Richardson & Colburn (Donald J. Unger and Brian F. Walsh) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*A. David Lafer*, Senior Trial Attorney); of counsel: *Craig R. Giesze*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr. and Patrick J. McDonough) for defendant-intervenor.

OPINION

TSOUICALAS, *Judge:* On March 31, 1988, The Torrington Company ("Torrington") filed a petition with Commerce, requesting the imposi-

tion of antidumping duties upon imports of all antifriction bearings, other than tapered roller bearings, and parts thereof, from the Federal Republic of Germany, Sweden, France, Italy, the United Kingdom, Japan, Romania, Singapore and Thailand. General Administrative Record ("GAR") (Pub.) Doc. 1. On May 3, 1989, the final results of the investigation of dumping findings from Japan were issued. *Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan* ("Final Results"), 54 Fed. Reg. 19,101 (1989).

On February 28, 1991, this Court affirmed the ITA's Final Results as to standing and the initiation of the cost of production investigation, Counts 1 and 3 of plaintiffs' complaint. *NTN Bearing Corp. of America v. United States*, 15 CIT ___, 757 F. Supp. 1425 (1991), *aff'd*, No. 91-1294, 1992 U.S. App. LEXIS 15758 (Fed. Cir. June 30, 1992). This action, brought by NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Toyo Bearing Co., Ltd. (collectively "NTN"), also challenges the Department of Commerce's final results. The issue in this case is limited to Count 2 of the complaint, that being the scope of the agency's investigation.

DISCUSSION

Pursuant to the Tariff Act of 1930, in reviewing a final determination of Commerce, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *The Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

Timeliness:

Defendants claim that plaintiffs' motion for judgment on the agency record was untimely filed and therefore is barred. They claim that by an order, dated April 3, 1990, this Court required that "counsel for plaintiffs and plaintiff-intervenors, if any, shall file and serve their principal briefs, pursuant to Rule 56.1, concerning * * * [s]cope [i]ssues * * * within sixty (60) days after April 11, 1990." *NTN Bearing Corp. v. United States*, Court No. 89-06-00350 (Order dated April 3, 1990) (emphasis omitted). Since over two years have elapsed from the date of the order, Commerce claims that NTN is now barred from pursuing their judicial remedies before this Court.

Commerce, however, fails to consider this Court's order of May 8, 1992 dismissing all counts not on appeal in this case with the exception

of the issue at hand; that being, the scope of the investigation and the inclusion of parts not sold in the United States. *NTN Bearing Corp. v. United States*, Court No. 89-06-00350 (Order dated May 8, 1992). The court's order stated that "*NTN Bearing Corp. v. United States*, is to remain on the court's docket limited to the issue of inclusion of parts not sold in the U.S. as alleged in Count II of NTN's complaint." *Id.* On March 2, 1992, this Court also ordered that any dispositive motions concerning the issues raised in pleadings, or any other issues, shall be filed by April 27, 1992 and any responses to these motions shall be filed in accordance with the Rules of this Court. *NTN Bearing Corp. v. United States*, Court No. 89-06-00350 (Order dated March 2, 1992). Plaintiffs' motion was indeed filed on April 27, 1992. Therefore, plaintiffs' motion was timely filed.

Scope of Determination:

We now turn to the principal issue in this case which is the scope of the investigation. Plaintiffs claim that the Department of Commerce failed to determine the scope of its investigation in this case and specifically whether parts and components were included therein. Consequently, they claim that Commerce erroneously included bearing parts in its determination.

NTN's allegations are misplaced because the petition unambiguously covers antifriction bearings and parts. This court has repeatedly held that Commerce has inherent authority to define the scope of an antidumping duty investigation. See *NTN Bearing Corp. of America v. United States*, 14 CIT ___, ___, 747 F. Supp. 726, 731 (1990); see also, *Diversified Prods. Corp. v. United States*, 6 CIT 155, 159, 572 F. Supp. 883, 887 (1983); *Royal Business Machines, Inc. v. United States*, 1 CIT 80, 507 F. Supp. 1007 (1980), *aff'd*, 669 F.2d 692 (1982). To determine whether a particular class or kind of foreign merchandise falls within the scope of an investigation, Commerce examines the description of the merchandise contained in the petition. See *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1027, 700 F. Supp. 538, 541 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990); *Royal Business Machines*, 1 CIT at 87, 507 F. Supp. at 1014. The determination "as to whether a product is covered by an antidumping investigation is one which the ITA must make with ample deference to the intent of the petition." *The Torrington Co. v. United States*, 16 CIT ___, ___, Slip Op. 92-21 at 14 (Feb. 28, 1992).

The petition in this case expressly provides that "the merchandise covered by this petition consists of all ground antifriction bearings and *all parts* thereof both finished and unfinished with the exception of tapered roller bearings." GAR (Pub.) Doc. 1 at 13 (emphasis added). When a petition is unambiguous on its face, then the Court must look to the plain meaning of the language to determine the scope of an investigation. Thus, the scope of Commerce's investigation in this case includes antifriction bearings *and* parts.

Additionally, NTN claims that there is no rational basis for Commerce's inclusion in its determination of articles not sold in the United

States. Plaintiffs cite 19 U.S.C. § 1673(1) (1988) which states that an antidumping duty order may be issued only if a class or kind of "foreign merchandise is being, or is likely to be, sold * * * in the United States at less than its fair value." NTN claims that in this case the imported raw material parts were not sold in the United States and therefore could not be the subject of dumping. Plaintiffs claim that they transferred the parts in question to their related party U.S. subsidiary which in turn first assembled the parts into a finished bearing in the United States and then made a sale of a finished antifriction bearing to an unrelated U.S. party. Therefore, they argue that these bearing parts should not be subject to dumping duties.

This Court has recognized commerce's authority to include parts within the scope of its investigation, thereby subjecting them to dumping duties. See *NTN Bearing Corp.*, 14 CIT ___, 747 F. Supp. 726; see also *Gold Star Co. v. United States*, 12 CIT 707, 710-11, 692 F. Supp. 1382, 1385 (1988), *aff'd sub nom.*, *Samsung Elecs. Co. v. United States*, 873 F.2d 1427 (Fed. Cir. 1989). These component parts have no independent application other than to be combined and further refined into completed roller bearings. *NTN Bearing Corp.*, 14 CIT at ___, 747 F. Supp. at 732.

In *NTN Bearing Corp.*, the court explicitly stated that when "pre-fabricated components are imported for the exclusive purpose of finishing into a product that *would* be subject to a dumping order, thereby escaping dumping penalties, then the components are properly within the scope of the investigation and subsequent order." *Id.* (emphasis in original).

If the Court were to allow separate importations of component parts to a related party for subsequent assembly into a finished product, "the domestic industry would continue to suffer the injurious consequences of dumped goods." *Gold Star Co.*, 12 CIT at 711, 692 F. Supp. at 1385. Plaintiffs, in this case, are apparently trying to circumvent the trade laws. Congress has attempted to thwart importers' circumvention strategies by sending "a clear message to foreign producers and trading partners that we will actively seek to prevent circumvention of our trade laws, and thereby decrease the incentive foreign producers might have to 'finesse' their way around our trade laws, in order to engage in recognized unfair trade practices." *NTN Bearing Corp.*, 14 CIT at ___, 747 F. Supp. at 731 (citing S. Rep. No. 71, 100th Cong., 1st Sess. 135 (1987)). It is apparent to this Court that NTN is attempting to circumvent the trade laws and this Court cannot encourage their actions. Therefore, this Court holds that Commerce properly included the bearing parts at issue within the scope of the determination.

Commerce's Margin Calculations:

Alternatively, NTN challenges Commerce's dumping margin calculations. In its final determination, Commerce included within the scope of that determination parts and components, manufactured by NTN in Japan and exported to the United States, as exporter's sales price transac-

tions. *Final Results* at 19,101. Commerce, however, excluded NTN's parts from the agency's dumping margin calculations. *Final Determinations of Sales at Less than Fair Value: Antifriction Bearings Other Than Tapered Roller Bearings and Parts Thereof From the Federal Republic of Germany* ("Antifriction Bearings from Germany"), 54 Fed. Reg. 18,992, 19,028-29 (1989). NTN claims that since Commerce excluded the parts from its calculations, it should have excluded parts from the determination altogether.

Commerce was concerned that their approach could rely on an analysis of sales of merchandise not covered by the proceedings. Commerce explained that where costs incurred in adding value in the United States were significant or differed significantly from similar costs that would have been incurred in the home market, not deducting U.S. value added could skew the dumping calculations. Therefore, for purposes of the final determinations, Commerce excluded from its calculations all ESP sales of bearings and parts with value added in the United States. *Antifriction Bearings from Germany*, 54 Fed. Reg. at 19,028-29. Commerce claims that the fact that they excluded ESP value-added sales from its calculations does not mean that the imported merchandise involved in such sales is excluded from the scope of these proceedings. *Id.*

It is well-established that Commerce possesses tremendous discretion when selecting its methodology. *GMN Georg Muller Nurnberg AG v. United States*, 15 CIT ___, ___, 763 F. Supp. 607, 612 (1991); *Mitsubishi Elec. Corp.*, 12 CIT 1025, 1050, 700 F. Supp. 538, 558; *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). Furthermore, when Commerce's selection is reasonable and its reasoning is fully explained at the administrative level, then its selection will be upheld by this Court. Contrary to NTN's contentions, Commerce fully explained its methodology at the administrative level as set forth in *Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 18,992, 19,028-29 (1989), and this Court finds that explanation reasonable and in accordance with law.

CONCLUSION

In accordance with the foregoing opinion, plaintiffs' motion was timely filed, and their motion is denied in all respects. The petition in this case unambiguously states that the scope of the investigation at issue includes antifriction bearings and parts. Furthermore, defendants reasonably explained their methodology at the administrative level which was in accordance with law. Therefore, Commerce's determination as to Count 2 of plaintiffs' complaint is affirmed.

(Slip Op. 92-137)

NEUWEG FERTIGUNG GMBH, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND
TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91-08-00587

Plaintiff moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record requesting this Court to remand this action to the Department of Commerce, International Trade Administration ("ITA"), for recalculation of the dumping margin by accounting for plaintiff's customer-specific product codes in matching home market and U.S. sales or, in the alternative, to require the ITA to use less punitive "best information available" ("BIA") as the margin for plaintiff's unmatched sales. Defendant moves to strike exhibit A of *Plaintiff's Reply to Defendant and Defendant-Intervenors' Memoranda in Opposition to Plaintiff's Motion for Judgment upon the Agency Record* ("Plaintiff's Reply") and the references to exhibit A on pages 5 and 8 of *Plaintiff's Reply*.

Held: Plaintiff's questionnaire responses were inadequate in not highlighting potential problems with its product codes. Also, plaintiff was on notice of a problem matching sales of identical bearings after participating in a disclosure conference with the ITA after the preliminary determination and made no effort to resolve the problem until after the final determination. As a result, the ITA was justified in using BIA for unmatched sales and its choice of BIA was reasonable. Exhibit A of *Plaintiff's Reply* is not a part of the administrative record on review before this Court and is ordered stricken.

[Plaintiff's motion for judgment on the agency record is denied; defendant's motion to strike granted; case dismissed.]

(Dated August 20, 1992)

Covington & Burling (Harvey M. Applebaum, David R. Grace and Thomas O. Barnett) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Velta A. Melnbrencis); of counsel: *Dean A. Pinkert* and *Douglas S. Cohen*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Myron A. Brilliant, Robert A. Weaver and Amy S. Dwyer) for defendant-intervenor The Torrington Company.

Frederick L. Ikenson P.C. (Frederick L. Ikenson, J. Eric Nissley and Joseph A. Perna V) for defendant-intervenor Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge*: Plaintiff, Neuweg Fertigung GmbH ("Neuweg"), moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record challenging the results of the first administrative review of antifriction bearings from the Federal Republic of Germany as it relates to Neuweg. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review* ("Final Results"), 56 Fed. Reg. 31,692 (1991). Plaintiff requests this Court to remand this action to the Department of Commerce, International Trade Administration ("ITA"), for recalculation of Neuweg's dumping margin by accounting for plaintiff's customer-specific product codes in matching home market and U.S. sales or, in the alternative, to require the ITA to use less punitive "best information available" ("BIA") as the margin for plaintiff's unmatched sales.

In addition, defendant moves pursuant to Rule 12(f) of the Rules of this Court to strike exhibit A of *Plaintiff's Reply to Defendant and Defendant-Intervenors' Memoranda in Opposition to Plaintiff's Motion for Judgment upon the Agency Record* ("Plaintiff's Reply") and the references to exhibit A on Pages 5 and 8 of *Plaintiff's Reply*.

BACKGROUND

Plaintiff requested that the ITA conduct an administrative review of plaintiff's sales of bearings. Administrative Record Germany Public ("AR Germany Pub.") Doc. 2. ITA sent Neuweg section A of the antidumping duty questionnaire which required Neuweg to "[d]escribe your product coding system as it applies to [antifriction bearings]. Provide a key to your product codes, including all prefixes, suffixes, or other notation, which identify special features." Administrative Record General Public ("AR Gen. Pub.") Doc. 3. Neuweg provided the requested information in Appendix A.4, Part 2, of its questionnaire response. AR Germany Pub. Doc. 105. When describing its product coding in its section B and C questionnaire responses, Neuweg referred back to Appendix A.4, Part 2, of its section A questionnaire response. AR Germany Pub. Docs. 193, 239.

On March 15, 1991, the ITA published the preliminary results of the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews* ("Preliminary Results"), 56 Fed. Reg. 11,200 (1991).

On March 25, 1991, the ITA held a disclosure conference with Neuweg's counsel to review the preliminary results. The case analyst's memorandum to the file documenting this meeting pointed out that the ITA had been unable to match a considerable number of U.S. sales with home market sales and states in relevant part that

the majority of these non matches appear to be the result of improper product codes. For a number of transactions on the [purchase price] database, the product code field also included the customer name, which, of course, prevented matching to take place with comparable home market sales or constructed value (CV).

AR Germany Pub. Doc. 542. Neuweg did nothing to address this problem until after release of the Final Results.

In its Final Results, the ITA explained its use of BIA in this review stating that

[i]f a firm failed to provide matching data for a significant portion of its reported U.S. sales by quantity, we used as BIA for those particular transactions the higher of (1) the firm's previous rate (or "all others" rate) from the [less than fair value] investigation, or (2) the highest calculated rate for any firm in this review.

Final Results, 56 Fed. Reg. at 31,705.

Neuweg had submitted difference in merchandise ("DIFMER") data only for models for which there were no contemporaneous home market sales, for use in matching bearings within bearing families when identical matches were not possible. As a result of the lack of DIFMER data for the bearings for which the ITA was unable to make identical matches, when the ITA tried to match U.S. sales to home market sales by bearing family, the ITA found that it was unable to match a "significant" number of Neuweg's U.S. sales to home market sales. AR Germany Pub. Doc. 655.

Since Neuweg had not participated in the initial less than fair value investigation, the ITA selected as BIA the 68.89% "all others" rate from the initial investigation as the margin for Neuweg's unmatched sales. AR Germany Confidential Doc. 210.

DISCUSSION

The Court's jurisdiction over this matter is derived from 28 U.S.C. § 1581(c) (1988).¹

A final determination by the ITA in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. Motion to Strike:

This Court's review of a final determination in an administrative review is limited to a review of the administrative record developed in that administrative review. 19 U.S.C. § 1516a(a)(2) (1988). The administrative record is defined as:

(i) a copy of all information presented to or obtained by the * * * administering authority * * * during the course of the administrative proceeding * * *; and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

19 U.S.C. § 1516a(b)(2)(A) (1988).

The case law of this court is very clear that the administrative record "is limited to the information that was presented to or obtained by the agency making the determination during the particular review proceeding for which section 1516 authorizes judicial review." *Beker Indus. Corp. v. United States*, 7 CIT 313, 316 (1984); see also *Intrepid v. United States*, 15 CIT ___, ___, Slip Op. 91-14 at 3-4 (March 1, 1991); *Ipsco, Inc. v. United States*, 13 CIT 489, 495, 715 F. Supp. 1104, 1109 (1989).

¹ 28 U.S.C. § 1581(c) provides in pertinent part:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

"Any information received by [the ITA] after the particular determination at issue is not part of the reviewable administrative record." *In-trepid*, 15 CIT at ___, Slip Op. 91-14 at 4 (citing *Ipsco*, 13 CIT at 495, 715 F. Supp. at 1109).

The "particular determination at issue" in this case is the ITA's Final Results published on July 11, 1991. The administrative record in this case consists of all materials submitted to or obtained by the ITA between the initiation of this administrative review on June 1, 1990 and the publication of the Final Results in this review on July 11, 1991. Any submissions made by plaintiff after July 11, 1991 are clearly not a part of the administrative record which this Court can use to review the Final Results.

Therefore, plaintiff's letter to the ITA dated July 18, 1991 is not a part of the administrative record before this Court for review and must be stricken.

2. Product Codes:

Administrative reviews of outstanding antidumping duty orders are complex and time-consuming endeavors. In order to complete reviews in a timely fashion, the ITA requires the full cooperation of respondents. This is especially true in regard to the review at issue here where literally millions of sales of antifriction bearings were subject to review.

ITA has a responsibility to be specific in the information it asks for and in explaining the exact format in which that information is to be provided. In this case, the ITA asked for information "[d]escrib[ing] your product coding system as it applies to [antifriction bearings]. Provide a key to your product codes, including all prefixes, suffixes, or other notation, which identify special features." AR Gen. Pub. Doc. 3 (emphasis added). In its questionnaire responses and in the computer tapes it submitted, Neuweg listed its product codes and included customer-specific information. As a result, the product codes for identical bearings sold in the U.S. and home markets were not the same.

ITA argues that Neuweg failed to provide the ITA with requested "information in the form required * * *, i.e., in a form which would permit the computer to match or compare United States and home market transactions, [therefore, the ITA] properly resorted to BIA for those sales which could not be matched." *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment upon the Agency Record* ("Defendant's Memorandum") at 8-9. Defendant-intervenors, Federal-Mogul Corporation ("Federal-Mogul") and The Torrington Company ("Torrington"), agree with the ITA. *Federal-Mogul Corporation's Opposition to Plaintiff's Motion for Judgment upon the Agency Record* ("Federal-Mogul's Opposition") at 3-8; *Opposition of Defendant-Intervenor, The Torrington Company, to Plaintiff's Motion for Judgment upon the Agency Record* ("Torrington's Opposition") at 7-8.

The administrative record contains no evidence that the ITA required that product code information for U.S. and home market sales of identical bearings be submitted in an identical form. The issue here is whether

Neuweg provided the ITA with the information the ITA requested in a reasonable format when the ITA did not specify an explicit format.

This Court finds that Neuweg did provide the information requested, but that Neuweg's questionnaire responses were inadequate in not highlighting to the ITA that the product codes could be a potential problem and in not suggesting ways to correct it, especially in its sections B and C questionnaire responses. In other instances in its questionnaire responses, Neuweg did point out potential problems with its data and suggest ways to avoid them. *See* AR Germany Pub. Docs. 193, 239.

Also, it is significant that Neuweg now states that it is ready to provide the ITA with computer programming instructions which will easily rectify the product code problems. *Memorandum in Support of Plaintiff's Motion for Judgment upon the Agency Record* ("Neuweg's Memorandum") at 11. Neuweg could have easily done this at the time it submitted its questionnaire responses.

In addition, and even more important, it is clear from the record that Neuweg was put on notice of the ITA's problems matching sales by product codes at the disclosure conference soon after the publication of the Preliminary Results. AR Germany Pub. Doc. 542. At this point in this proceeding, the ITA did not have the time or the resources to devote to figuring out how to adjust Neuweg's product codes in order to allow matching of all U.S. and home market sales. It was sufficient that the ITA notified Neuweg of the existence of the problem, at that point it was up to Neuweg to determine the cause and rectify it if possible. As pointed out above, Neuweg could easily have presented the ITA with computer programming instructions which would have resolved the problem.

Ultimately it is the respondent's responsibility to make sure that the ITA understands, and correctly uses, any information provided by the respondent. *See Asociacion Colombiana de Exportadores v. United States*, 13 CIT 13, 24, 704 F. Supp. 1114, 1124 (1989), *aff'd*, 901 F.2d 1089 (Fed. Cir. 1990), *cert. denied*, 111 S.Ct. 136 (1990) ("[P]arties must submit data promptly, and be very clear as to what the data indicates."). This is especially true here where the ITA pointed out the problem to the respondent at a disclosure conference. Neuweg failed to do anything about this problem until after the publication of the Final Results.

3. Best Information Available:

As a result of its inability to match sales of identical bearings in the U.S. and home markets, the ITA tried to match sales of bearings within the same bearing family. However, since Neuweg had provided DIF-MER data for only those bearings which it believed the ITA would be unable to match, the ITA was unable to make any transaction matches for a "significant" number of Neuweg's U.S. sales. As a result the ITA resorted to BIA.

19 U.S.C. § 1677e(c) (1988) provides that:

In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

See also 19 C.F.R. § 353.37 (1991).

Since Neuweg's questionnaire responses were inadequate in not highlighting to the ITA potential problems with its questionnaire response information regarding product codes, was untimely in finally trying to explain the problem and assist the ITA in correcting it after it was pointed out to them, and also failed to provide needed DIFMER data for matching U.S. sales within bearing families, the ITA was justified in using BIA as the margin for Neuweg's unmatched U.S. sales.

When the ITA determines that the use of BIA is required, it is granted broad discretion in its choice of what to use as BIA. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 n.9 (Fed. Cir. 1990); *Chemical Prods. Corp. v. United States*, 10 CIT 626, 634, 645 F. Supp. 289, 295, remand order vacated, 10 CIT 819, 651 F. Supp. 1449 (1986). All that is required is that the ITA give a reasonable explanation of its choice.

Since Neuweg was not a participant, by its own decision, in the initial less than fair value investigation, it was subject to the "all others" rate of 68.89% in that investigation.

In the Final Determination at issue here the ITA explained that if the ITA was unable to match a significant portion of a respondent's U.S. sales with home market sales, the ITA would use "the higher of (1) the firm's previous rate (or "all others" rate) from the [less than fair value] investigation, or (2) the highest calculated rate for any firm in this review" for BIA as the margin for these unmatched sales. *Final Results*, 56 Fed. Reg. at 31,705. Under this rationale, the highest applicable BIA rate for Neuweg was the 68.89% "all others" rate from the initial investigation.

Neuweg contends that, given the circumstances of this case, the choice of the 68.89% "all others" rate as BIA was punitive. *Neuweg's Memorandum* at 15-20. The Court of Appeals for the Federal Circuit has stated that the use of the highest prior margin as BIA is not punitive, rather there is a presumption that it "is the most probative evidence of current margins." *Rhone Poulenc*, 899 F.2d at 1190.

This Court finds that the use of the 68.89% "all others" rate from the initial investigation for the margin for Neuweg's unmatched U.S. sales was a reasoned exercise of the ITA's discretion in choosing what information to use as BIA.

CONCLUSION

Since exhibit A of *Plaintiff's Reply* is not a part of the administrative record subject to review by this Court, the exhibit and all references to it in *Plaintiff's Reply* are ordered stricken. In addition, the Court finds

that Neuweg's questionnaire responses were inadequate in not highlighting potential problems with its product codes and in presenting ways to avoid these problems, and was untimely in addressing this problem when it was brought to their attention by the ITA. As a result, the ITA was justified in resorting to the use of the 68.89% "all others" rate from the less than fair value investigation as BIA as the margin for Neuweg's unmatched U.S. sales.

ABSTRACTED CLA

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	A
C92/132 8/10/92 Musgrave, J.	E.B. Eddy Forest Products Ltd.	91-6-00419	4810. 2.5
C92/133 8/10/92 Musgrave, J.	E.B. Eddy Forest Products Ltd.	91-12-00914	4810. 1.5
C92/134 8/10/92 Musgrave, J.	John V. Carr & Son, Inc.	91-12-00846	254.4 3% 25- 4.7
C92/135 8/10/92 Musgrave, J.	Sea-Land Service, Inc.	90-5-00230	This cha fie Ser 08/ HR (8/ HR (6/ 866 Fre
C92/136 8/10/92 Musgrave, J.	Tohoku America, Inc.	92-3-00207	8712. 11
C92/137 8/12/92 Newman, S.J.	G. Heileman Brewing Co.	86-11-01447	533.3 13.
C92/138 8/12/92 Newman, S.J.	Martin's Herend Import's, Inc.	90-4-00177	534.9 69 695 9%

CLASSIFICATION DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
0.11.90 5% or 1.5%	4802.52.90 Free of duty	E. Dillingham, Inc. v. U.S., S.O. 91-40 (1991)	Ogdensburg, etc. Various grades of printing paper
0.11.90 5% or 1.0%	4802.52.90 Free of duty	E. Dillingham, Inc. v. U.S., S.O. 91-40 (1991)	Buffalo and Detroit Various grades of printing paper
46 % 54.56 7% or 4.4%	252.87 Free of duty 252.75 2.9% or 2.4%	E. Dillingham, Inc. v. U.S., S.O. 91-40 (1991)	Detroit Various grades of printing and writing paper
s type of mer- chandise classi- fied by Customs service in HR 35296 (12/6/89), R 087580 4/6/90), and R 08347 4/15/89) under 509.00.0000 Free of duty	Customs to reliquidate merchandise under 8609.00.0000 Free of duty	Agreed statement of facts	Seattle and Elizabeth Refrigerated freight containers
200.35 1%	8712.00.25 —	Agreed statement of facts	Los Angeles Bicycles having 700c wheel rims.
30 3.5%	A534.87 Free of duty	G. Heileman Brewing Co. v. U.S., S.O. 90-87 (1990)	Baltimore Certain ceramic steins imported from Brazil
94, 11.90.00505 or 23.10.50 %	534.11 or 6913.10.10 3.1%	Agreed statment of facts	Dulles Int'l Airport and Baltimore Porcelain figurines

C92/139
8/12/92
Newman, S.J.

Viam Manufacturing,
Inc.

90-12-00619

389.50
5¢ per lb
15.7%

C92/140
8/13/92
Musgrave, J.

Berndorf ICB, Inc.

92-3-00178

7219.33.00
10.1%

C92/141
8/14/92
Aquilino, J.

E. Gluck Corp.

83-5-0652S2

716.09-71
715.05,
Various

C92/142
8/14/92
Aquilino, J.

E. Gluck Corp.

84-10-01400

716.09-71
715.05,
Various

C92/143
8/14/92
Aquilino, J.

E. Gluck Corp.

86-8-01045

716.09-71
715.05,
Various

C92/144
8/14/92
Aquilino, J.

E. Gluck Corp.

86-12-01537

716.09-71
715.05,
Various

C92/145
8/14/92
DiCarlo, C.J.

Mattel, Inc.

86-3-00276

737.95
10.9% o

lb. +	360.83 10.6%	Agreed statement of facts	Los Angeles Floor mats for automobiles
00	7326.90.90 5.7%	Agreed statement of facts	Seattle Stainless steel process bands for a Siempel- kamp Conti-Roll particle board press
16.45, etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. v. U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments, Inc. v. U.S., 673 F.2d (Fed. Cir. 1982)	New York Quartz Analog watches, etc.
16.45, etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. v. U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments, Inc. v. U.S., 673 F.2d 1375 (Fed. Cir. 1982)	New York Quartz Analog watches, etc.
16.45, etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. v. U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments, Inc. v. U.S., 673 F.2d 1375 (Fed. Cir. 1982)	New York Quartz Analog watches, etc.
16.45, etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. v. U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments, Inc. v. U.S., 673 F.2d 1375 (Fed. Cir. 1982)	New York Quartz Analog watches, etc.
or 9.6%	912.20 Free of duty	Mattel, Inc. v. U.S., 733 F.Supp. 1503 (1990), rev'd, 926 F.2d 1116 (Fed. Cir. 1991)	New York Toys, etc.

ABSTRACTED CLASSIFICATION

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSMENT
C92/146 8/14/92 DiCarlo, C.J.	Mattel, Inc.	86-9-01086	737.95 10.9% of
C92/147 8/14/92 DiCarlo, C.J.	Mattel, Inc.	86-9-01122	737.95 10.9% of
C92/148 8/14/92 DiCarlo, C.J.	Mattel, Inc.	87-6-00744	737.95 10.9% of
C92/149 8/14/92 Musgrave, J.	Pharmacia LKB Biotechnology Inc.	91-4-00260	8421.99.00 3.9% for Management .00 3.99 Protein Protein Protein Calmodulin 1712.05 laser densitometry
C92/150 8/17/92 Goldberg, J.	Pollak Import-Export Corp.	89-5-00255	384.62 20% + 3

ATION DECISIONS—continued

ISSUED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
or 9.6%	912.20 Free of duty	Mattel, Inc. v. U.S., 733 F.Supp. 1503 (1990), rev'd, 926 F.2d 1116 (Fed. Cir. 1991)	New York Toys, etc.
or 9.6%	912.20 Free of duty	Mattel, Inc. v. U.S., 733 F.Supp. 1503 (1990), rev'd, 926 F.2d 1116 (Fed. Cir. 1991)	New York Toys, etc.
or 9.6%	912.20 Free of duty	Mattel, Inc. v. U.S., 733 F.Supp. 1503 (1990), rev'd, 926 F.2d 1116 (Fed. Cir. 1991)	New York Toys, etc.
00 or FPLC er 3914.00 % for A, FITC A, FITC G, and ulin 5 10% for meter	8524.90.40 9.7% per square meter of recording surface for FPLC Manager 3002.90.50 Free of duty for Protein A, FITC Protein A and Protein G 3001.20. 00 1.5% for Calmodulin 712. .49 4.9% for laser densitometer	Pharmacia Inc. v. U.S., Ct. No. 90-6-00279, Abs. C91/343 (Nov. 22, 1991); Pharmacia Inc. v. U.S., Ct. No. 86-5-00631, Abs. C88/235 (Dec. 29, 1988)	New York FPLC Manager, diskettes containing software for use with liquid chromatography apparatus; Protein A, and FITC Protein A, and Protein G, toxin- type binding reagents used in cell biology; Calmodulin, an extract from animal organs used in cell biology; Ultroscan XL Enhanced Laser Densitometer
31¢ per lb.	384.63 17%	Agreed statement of facts	New York Ladies 100% wool or boiled wool knitted cardigan jackets



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